FILE COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 450

ARTHUR P. ALLEN, CHAIRMAN, TWELFTH REGION WAGE STABILIZATION BOARD, ET AL., APPELLANTS,

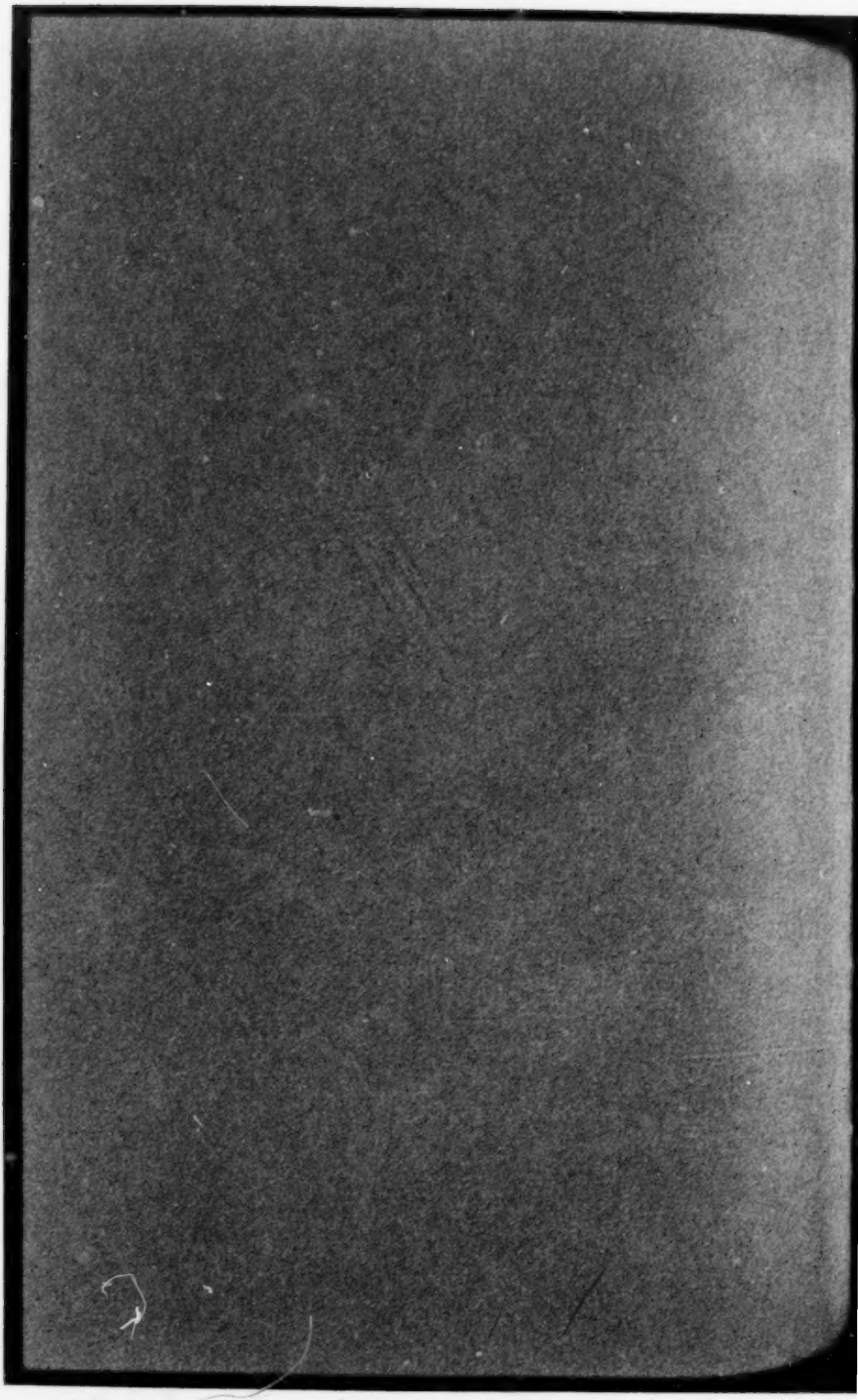
vs.

GRAND CENTRAL AIRCRAFT CO., A CALIFORNIA CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED NOVEMBER 2, 1953

Probable jurisdiction noted January 4, 1954



BLEED THROUGH

BLURRED COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 450

ARTHUR P. ALLEN, CHAIRMAN, TWELFTH REGION WAGE STABILIZATION BOARD, ET AL., APPELLANTS,

vs.

GRAND CENTRAL AIRCRAFT CO., A CALIFORNIA CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR TH NORTHERN DISTRICT OF CALIFORNIA

INDEX

	Original	Print
Record from the U.S.D.C., Northern District of California, Southern Division	1	1
Complaint for preliminary and perpetual injunction	1	1
Complaint issued by Wage Stabilization Board and filed with National Enforcement Commission	12	8
Notice of motion for preliminary injunction	16	10
Motion to dismiss complaint	18	11
Notice of motion	20	12
Order shortening time for serving motion	20	12
Affidavit of Keene Watkins	21	12
Order convening three-judge court	26	15
Temporary restraining order	27	15
Motion to vacate temporary restraining order	29	16
Order denying motion of defendants to vacate temporary restraining order	30	17
Memorandum order for interlocutory injunction	32	17
Reservation of decision on motion to dismiss complaint	34	18
Interlocutory injunction	36	19
Bond (omitted in printing)	39	

	Original	Print
Record from the U.S.D.C., Northern District of California, Southern Division—Continued		
Answer to complaint	41	20
Notice of association of counsel	45	23
Stipulation for amendment of complaint and for service and filing of supplemental complaint	46	24
First amendment to complaint for preliminary and perpetual injunction	48	25
Supplemental complaint for perpetual injunction	56	29
Order allowing amendment of complaint and approving service and filing of supplemental complaint pursuant to stipulation	59	30
Judgment of permanent injunction	61	31
Opinion, Friedman, J.	65	33
Findings of fact and conclusions of law	70	37
Petition for appeal	72	38
Assignment of errors	73	38
Order allowing appeal	75	39
Citation on appeal (omitted in printing)	76	
Statement required by paragraph 2, Rule 12 of the rules of the Supreme Court (omitted in printing)	102	
Praecipe (omitted in printing)	132	
Clerk's certificate (omitted in printing)	133	
Statement of points to be relied upon and designation of record	135	40
Stipulation as to printing record	137a	40
Order noting probable jurisdiction	138	41
Proceedings on hearing of complaint for preliminary and perpetual injunction in the United States District Court for the Northern District of California	139	42
Appearances	139	42
Colloquy between Court and counsel	140	42
Offers in evidence	146	45
Testimony of Robert O. Denny	152	48
Oscar T. Lawler	178	62
Donald W. Cook	200	73
Plaintiff's Exhibit "B"—Computation of violative payroll Tucson Productive Unit	206	77
Plaintiff's Exhibit "F"—Grand Central Aircraft Co., Schedule of available cash, June 21 to July 19, 1953	208	79

BLEED THROUGH

BLURRED COPY

1 [File endorsement omitted]

In United States District Court, Northern District of California, Southern Division

No. 32541

GRAND CENTRAL AIRCRAFT CO., A CALIFORNIA CORPORATION, PLAINTIFF

vs.

ARTHUR P. ALLEN, CHAIRMAN TWELFTH REGION WAGE STABILIZATION BOARD; RUDOLPH F. HERNREID, MEMBER TWELFTH REGION WAGE STABILIZATION BOARD; ERNEST A. NORBACH, TWELFTH REGION COUNSEL; JOSEPH I. NACHMAN, CHIEF OF RULINGS AND OPINIONS BRANCH TWELFTH REGION WAGE STABILIZATION BOARD; JEROME SMITH, CHIEF ENFORCEMENT ATTORNEY, TWELFTH REGION WAGE STABILIZATION BOARD; CHARLES C. KILLINGSWORTH, CHAIRMAN WAGE STABILIZATION COMMITTEE; H. L. ENARSON, HERMAN LAZARUS AND MEYER S. RYDER, MEMBERS OF WAGE STABILIZATION COMMITTEE; PHIL C. NEAL, ENFORCEMENT COMMISSIONER; CHARLES O. GREGORY, CHAIRMAN NATIONAL ENFORCEMENT COMMISSION; HELEN F. HUMPHREY, RALPH F. FUCHS AND LAWSON F. BERNSTEIN, MEMBERS OF NATIONAL ENFORCEMENT COMMISSION; ISAAC GRONER, CHIEF COUNSEL FOR WAGE STABILIZATION COMMITTEE; DOE ONE, DOE TWO, DOE THREE, DOE FOUR, DOE FIVE AND DOE SIX, DEFENDANTS

COMPLAINT FOR PRELIMINARY AND PERPETUAL INJUNCTION—Filed February 13, 1953

Plaintiff, Grand Central Aircraft Co., a California corporation, doing business at 1310 Airway, Glendale, California, brings this, its complaint, against the above named defendants and each of them, and complains and alleges as follows:

2 I

This action arises under the Constitution of the United States, Article 1, Sections 1 and 9; the 5th, 6th, 7th, 8th and 16th amendments to the Constitution of the United States; and the Defense Production Act of 1950, 64 Stat. 798, as amended, 66 Stat. 296, U.S.C. Title 50 App., Sections 2061, et seq.; as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

II

Plaintiff is a corporation incorporated under the laws of California, with its principal office and place of business in the City of Glendale, California, and a branch plant at Tucson, Arizona. Its plants at Tucson and Glendale have been and are now engaged in the production, modification, and overhaul of aircraft equipment under contracts entered into prior to the enactment of the Defense Production Act of 1950.

III

Pursuant to the provisions of the Defense Production Act of 1950, as amended, on or about September 9, 1950, an Economic Stabilization Agency was established by executive order for the purpose of administering wage and price controls. Section 402(b) of the Defense Production Act of 1950, as amended, creates a Wage Stabilization Board within the Economic Stabilization Agency, said Board to be composed, in equal numbers, of members representative of industry, labor, and the general public, appointed by the President with the advice and consent of the Senate. Said members were appointed by the President on or about July 31, 1952. Regional Wage Stabilization Boards were thereafter established by regulation in order to assist the National Board in its functions. On or about December 6, 1952, the industry members of said National and Regional Boards resigned. On December 15, 1952, the Economic Stabilization Administrator purported to establish a Wage Stabilization Committee composed of the duly appointed public
3 members of the said National Board, which Committee was directed to carry out the statutory functions of the National Wage Stabilization Board. Pursuant to the order of said Committee, only the public members of said Regional Boards have continued to serve on said regional Boards.

IV

Defendant Arthur P. Allen is chairman of the Wage Stabilization Board for the Twelfth Region, and defendant Rudolph F. Hernried is the only other present member thereof. Defendant Ernest A. Norbach is Regional Counsel thereof. Defendant Joseph I. Nachman is Chief of the Rulings and Opinions Branch thereof. Defendant Jerome Smith is Chief Enforcement Attorney thereof. Defendant Charles C. Killingsworth is chairman of the National Wage Stabilization Committee, and Defendants H. L. Enarson, Herman Lazarus, and Meyer S. Ryder are the present members of said committee. Defendant Isaac Groner is Chief Counsel for said committee.

BLEED THROUGH

BLURRED COPY

V

On or about July 30, 1952, General Order No. 18 was issued by the Economic Stabilization Administrator, establishing a National Enforcement Commission. Said Commission was given the purported power by said order to determine the amount of wages paid in violation of regulations promulgated pursuant to the Defense Production Act, as amended, and to certify such determination to other governmental agencies so that the amount of such wage shall be disallowed for the purposes of determining costs or expenses under other laws or regulations. On August 21, 1952, General Procedural Regulation 1, Revised, was issued by the Economic Stabilization Agency, establishing the procedures to be followed in disallowance proceedings before the National Enforcement Commission.

4

VI

Defendant Charles O. Gregory is Chairman of said National Enforcement Commission, and Defendants Helen F. Humphrey, Ralph F. Fuchs, and Lawson F. Bernstein are the present members of said Commission.

VII

The true names of Defendants Doe One, Doe Two, Doe Three, Doe Four, Doe Five and Doe Six are unknown to plaintiff and for that reason they are sued herein under fictitious names, and plaintiff prays that when the true names of said defendants are ascertained they may be inserted herein by amendment of this complaint and that this action may then proceed against them under their true names.

VIII

On January 26, 1951, General Wage Stabilization Regulation 1 was issued by the Economic Stabilization Administrator. Said regulation prohibited any wage increases.

IX

On November 4, 1952, a complaint against this plaintiff was issued by the Wage Stabilization Board and was filed with the National Enforcement Commission. A copy of said complaint is attached hereto. Said complaint alleged that plaintiff granted wage increases to employees in its productive and non-productive units at its Glendale and Tucson plants during the period from January 26, 1951, to January 1, 1952, and that such increases violated General Wage Stabilization Regulation 1. On November 21, 1952, plaintiff filed with the National Enforcement Commission a motion for a more definite statement of the allegations in said complaint or for a bill of particulars. Said motion was denied on December 15, 1952,

except the following language was ordered added to Paragraph 2 of the said complaint:

5 "The wage increases referred to are only those denominated upon respondent's records as having been granted for 'merit' to the employees in the productive and non-productive units (which respondent calls 'direct' and 'indirect') at both its Glendale and Tucson plants, between January 26 and December 31, 1951. Said increases required the prior approval of the Wage Stabilization Board, which prior approval was not obtained."

X

On January 14, 1953, defendant Neal was appointed by the National Enforcement Commission to hear the allegations of said complaint and to recommend a determination of the same to the Commission. On January 28, 1953, plaintiff moved said defendant to dismiss the said complaint upon the grounds set forth in paragraphs XIII and XIV below. This motion was denied by defendant Neal on or about February 11, 1953, upon the ground that he was without power to rule on the constitutionality of the Defense Production Act or on the validity of the regulations promulgated thereunder. A hearing on the allegations of the said complaint before defendant Neal has been set for February 24, 1953, at Los Angeles, California, notice of which was received by plaintiff on February 11, 1953.

XI

The Wage Stabilization Committee, through its members, attorneys and agents, namely, defendants Killingsworth, Enarson, Lazarus, Ryder, Groner, Allen, Hernried, Smith, Norbach and Nachman, threatens to prosecute the said complaint before the National Enforcement Commission.

XII

The National Enforcement Commission, through its members, attorneys, and agents, namely, defendants Humphrey, Fuchs,
6 Bernstein and Neal, threatens to conduct a hearing on the allegations of said complaint and to render decision thereafter.

XIII

The regulations, orders, and other documents under authority of which defendants are threatening to hold or prosecute said hearing are null and void, and any action taken by defendants in holding or prosecuting such hearing or in rendering decision upon the alle-

BLEED THROUGH

BLURRED COPY

gations of the said complaint will be without authority of law and of no force whatsoever in the following particulars:

(a) General Wage Stabilization 1 purported to impose a ceiling on wages and is therefore in conflict with the Defense Production Act, which authorized only the stabilization of wages;

(b) By the above referred to General Order 18, the National Enforcement Commission is directed to follow General Order 15 of the Economic Stabilization Agency in determining the amount of wage paid in violation of regulation, which should be certified to other government agencies. Said General Order 15 is void in that it directs the disallowance of the entire amount of such wage in the absence of mitigating circumstances, and is therefore in conflict with Section 402(b) of the Defense Production Act, which section authorizes disallowance only of that part of the wage paid which exceeds the amount payable without violation of regulation;

(c) Said General Order No. 15 and General Procedural Regulation 1, Revised, were not accompanied by any statement that their promulgation was preceded by consultation with industry representatives and that consideration was given to the
7 recommendations of said representatives, or that circumstances rendered such consultation impossible. Said regulations are therefore in conflict with Section 709 of the said Act, which requires that such a statement accompany any rule, regulation or order or amendment thereto, promulgated under authority of the said Act.

(d) The Wage Stabilization Committee and the Twelfth Regional Wage Stabilization Board, which are prosecuting the said complaint, are composed only of the persons previously appointed as public members of the National and Regional Wage Stabilization Boards, respectively, in conflict with Section 403(b)(1) of the Defense Production Act which directs that the Board administering wage controls shall be composed of representatives of industry, labor, and the public;

(e) The said Wage Stabilization Committee is prosecuting the said complaint under the authority and control of the Economic Stabilization Administrator and not under the authority or control of the Attorney General, in conflict with Section 706(b) of the Defense Production Act, which requires that all litigation arising under said Act be under the supervision and control of the Attorney General;

(f) The said complaint is vague, ambiguous, and uncertain and is in conflict with General Procedural Regulation 1, Revised, which requires that complaints filed before the National

Enforcement Commission set forth a concise statement of the facts alleged to constitute the contravention of the Defense Production Act or regulations issued thereunder;

(g) A hearing conducted upon the allegations of said
8 complaint will deny plaintiff due process of law in that the complaint is so vague and general that plaintiff is not adequately apprised of the charges brought against it.

XIV

The Defense Production Act of 1950, as amended, is unconstitutional as applied to plaintiff in the following particulars:

(a) Said Act makes no express provision for judicial review of wage regulations issued thereunder, and no such review was intended to be provided by Congress. Disallowance of plaintiff's wage costs pursuant to Section 405(b) thereof will deprive plaintiff of due process of law under the 5th Amendment to the Constitution of the United States, in that plaintiff will be unable to attack the validity of General Wage Stabilization Regulation 1, or any other applicable regulations before any agency or any court;

(b) Said Act makes no express provision for judicial review of certifications of disallowance issued under the authority of Section 405(b) thereof, and no such review was intended to be provided by Congress. Action by the National Enforcement Commission on the matters alleged in the said complaint now before it will deprive plaintiff of due process of law under the 5th Amendment to the Constitution of the United States, in that plaintiff will be unable to attack the validity of such action before any court;

(c) Section 405(b) of said Act fails to make provision for plaintiff's right to a jury trial, although that right is
9 guaranteed to plaintiff by the 7th Amendment to the Constitution of the United States;

(d) Section 405(b) of said Act authorizes imposition of a tax on plaintiff's gross receipts although said tax is not apportioned as required by Article 1, Section 9, of the Constitution of the United States, and although said tax is not a tax permitted by the 16th Amendment to the Constitution of the United States.

(e) Section 405(b) of said Act as applied to plaintiff will impair the obligation of plaintiff's contracts and thereby deprive plaintiff of due process of law;

(f) Section 405(b) of said Act imposes an excessive fine in violation of the 8th Amendment to the Constitution of the United States;

BLEED THROUGH

BLURRED COPY

(g) Title 4 of said Act is unconstitutional in authorizing stabilization of wages paid by plaintiff, for the reason that there is no congressional power to stabilize plaintiff's wages in the absence of a declaration of war.

(h) Title 4 of said Act purports to delegate legislative power to the President without imposition of any sufficient standard to guide the exercise of said power, and is therefore in conflict with Article 1, Section 1, of the Constitution of the United States;

(i) Section 403(b) of said Act denies plaintiff due process of law in that it establishes a board composed of representatives of private groups who have a pecuniary interest in the regulations which they are appointed to promulgate and administer, and who are therefore unable to promulgate or administer said regulations in a fair and impartial manner.

10

XV

Plaintiff denies in good faith that it has violated the Defense Production Act of 1950, as amended, or any regulation or order issued pursuant thereto. Prosecution of the complaint issued by the Wage Stabilization Board and now filed with the National Enforcement Commission will cause irreparable damage to plaintiff in that:

(a) Plaintiff will be threatened for an extended period of time with the retroactive disallowance by one or more government agencies of the entire amount of wages paid to its employees during the period of almost a year which is brought into question by said complaint. Said contingent liability will prevent plaintiff from entering into contracts and conducting and expanding its business in normal fashion until said liability is determined;

(b) Plaintiff's employees and officers will be required to spend large amounts of time, at great cost to plaintiff, in gathering and presenting data and acting as witnesses for the purposes of plaintiff's defense. Plaintiff will also be required to retain counsel, at further cost to plaintiff. All of said expenses incident to the conduct of the void proceeding before the National Enforcement Commission will be irrecoverably lost to plaintiff;

(c) Any order issued by the said Commission in certifying disallowance of plaintiff's costs to one or more government agencies will require said agencies to make the said disallowance at great cost to plaintiff, although plaintiff will be unable to attack such action before said agencies or before any court.

11

WHEREFORE, plaintiff prays that the above entitled Court grant the following relief:

(1) Issue a preliminary injunction against the defendants and each of them, and their agents, servants, attorneys, successors in office, and all persons in active concert or participation with them, pending the final determination of this action and until further order of this court restraining them from prosecuting, hearing any charges brought against, or otherwise proceeding against plaintiff, with respect to any alleged violations of the Defense Production Act of 1950 as originally enacted and as amended, or of any regulations or orders issued pursuant thereto;

(2) Issue an injunction after the hearing of the cause permanently enjoining the defendants, and each of them, or their successors in office, from so prosecuting, hearing charges, or otherwise proceeding against the plaintiff; and

(3) Grant such other relief as shall be found necessary or appropriate in the premises.

Dated: February 12th, 1953.

LATHAM & WATKINS,
By R. W. LUND,
Attorneys for Plaintiff Grand Central Aircraft Co.

12 United States of America

Before the National Enforcement Commission, Economic Stabilization Agency

Case No. 12-122

In the Matter of GRAND CENTRAL AIRCRAFT COMPANY, P. O. Box 3157, Grand Central Station, Glendale, California

COMPLAINT

Section 405(b) of Title IV of the Defense Production Act of 1950, as amended (64 Stat. 803; U. S. Code, Title 50, App., Supp. Section 2101 et seq.), hereinafter referred to as the "Act", provides that no employer shall pay wages, salaries or other compensation in contravention of any regulation or order issued thereunder by *the* Wage Stabilization Board.

It appearing to the Wage Stabilization Board that Grand Central Aircraft Company, hereinafter referred to as the "Employer", has contravened the Act and the Regulations and Orders issued thereunder, and that an enforcement proceeding should be commenced before the National Enforcement Commission, Economic Stabiliza-

BLEED THROUGH

BLURRED COPY

tion Agency, the Wage Stabilization Board, Region XII, issues this complaint pursuant to the National Enforcement Commission General Procedural Regulation No. 1, Revised, Economic Stabilization Agency, a copy of which is hereto attached.

The employer has the right to submit a written answer to the allegations of the complaint set forth below with the National Enforcement Commission, Economic Stabilization Agency, Washington 25, D. C., within fifteen days after receipt of this complaint, serving a copy by registered mail upon Ernest H. Norback, Regional Counsel, Region XII, Wage Stabilization Board, 1254 Flood
13 Building, 870 Market Street, San Francisco, California. Any allegation in this complaint not specifically denied by answer will be deemed to have been admitted.

The employer has the right to a hearing before the National Enforcement Commission on this complaint at which he may present evidence and testimony and examine and cross-examine witnesses.

If the National Enforcement Commission finds that any wage, salary or other compensation payment has been made in contravention of the Act and the regulations or orders issued thereunder, the Commission may determine that disallowances may be made for one or more of the following purposes:

(1) Calculating deductions or the basis for determining gain under the Revenue Laws of the United States;

(2) Determining costs and expenses under any contract made by or on behalf of the United States, either directly or indirectly;

(3) Establishing any maximum price pursuant to the Act; and

(4) Determining the costs or expenses of any person for the purpose of any other law or regulation.

The National Enforcement Commission shall determine that the amount to be disregarded or disallowed by the executive departments and other government agencies is the entire amount of wages, salaries or other compensation paid in contravention of the Act and regulations or orders issued thereunder, unless it finds that extenuating and mitigating circumstances exist as provided in General Order 15, Economic Stabilization Agency. The National Enforcement Commission may, in consideration of such circumstances, determine that less than the entire amount of such
14 payments shall be certified to and disregarded by the executive departments or other government agencies.

ALLEGATIONS OF THE COMPLAINT

The Wage Stabilization Board, Region XII, by its Regional Counsel complains of the employer and alleges:

1. The employer is a corporation organized and existing under the laws of the State of California with its principal office and place of business at Glendale, California, and a branch plant at Tucson, Arizona, and at all times hereinafter mentioned has had in its employ units of productive and non-productive employees whose wages, salaries and other compensation are under the jurisdiction of the Wage Stabilization Board.

2. During the period beginning on or about January 26, 1951 to on or about January 1, 1952, the employer granted wage increases to the employees in the productive and non-productive units of its Glendale, California plant, and to the employees in its productive and non-productive units of its Tucson, Arizona branch plant, all of which wage increases were contrary to General Wage Stabilization Regulation 1.

Dated at San Francisco, California, this 4th day of November, 1952.

WAGE STABILIZATION BOARD
REGION XII,
By ERNEST H. NORBACK,
Regional Counsel.

Attachment: General Procedural Regulation 1, Revised.

15 *Duly sworn to by S. Carpenter. Jurat omitted in printing.*

16 In United States District Court

[Title omitted]

NOTICE OF MOTION FOR PRELIMINARY INJUNCTION—Filed February 13, 1953

To: Arthur P. Allen, Rudolph F. Hernried, Ernest A. Norbach, Joseph I. Nachman, Jerome Smith, Charles C. Killingsworth, H. L. Enarson, Herman Lazarus, Meyer S. Ryder, Phil C. Neal, Charles O. Gregory, Helen F. Humphrey, Ralph F. Fuchs, Lawson F. Bernstein and Isaac Groner:

Please take notice that upon the verified Complaint in the above entitled action, a copy of which is annexed hereto, at the United States District Court Rooms in the U. S. Post Office and Court House Building in the City of San Francisco, State of California, on the 20 day of February, 1953, before Judge Harris, at the opening

BLEED THROUGH

BLURRED COPY

of the Court on that day, or as soon thereafter as counsel can be heard, a motion will be made for a Preliminary Injunction against the defendants herein in accordance with the prayer of said
17 Complaint and for such other and further relief in the premises as to the Court may seem just and proper.

Dated: February 12, 1953.

LATHAM & WATKINS,
By (S.) R. W. LUND,
Attorneys for Plaintiff.

18 [File endorsement omitted]

In United States District Court

[Title omitted]

MOTION TO DISMISS COMPLAINT—Filed February 17, 1953

Come now the defendants Arthur P. Allen, Rudolph Hernried, Ernest H. Norback, Joseph I. Nachman, Jerome Smith and Phil C. Neal, appearing through the United States Attorney for the Northern District of California, and move to dismiss the complaint herein upon the following grounds:

19 I

The complaint fails to state a cause of action upon which relief may be granted.

II

The Court lacks jurisdiction of indispensable parties.

III

This is a suit against the United States of America, which has not given its consent thereto.

IV

The plaintiff has failed to exhaust its administrative remedies.

CHAUNCEY TRAMUTOLO,
United States Attorney.
CHARLES ELMER COLLETT,
Asst. U. S. Attorney.

Of Counsel:
ERNEST H. NORBACK,
Regional Counsel,
JOSEPH I. NACHMAN,
Attorney,
Wage Stabilization Board, Region XII,
Flood Building, San Francisco, California.

20 In United States District Court

NOTICE OF MOTION

To: Latham & Watkins, 830 Statler Center, Los Angeles, California, Attorneys for the plaintiff:

Please take notice that the foregoing motion to dismiss will be brought on for hearing before the Court on Friday, February 20, 1953, at 10:00 A.M.

CHAUNCEY TRAMUTOLO,
United States Attorney.

In United States Circuit Court

ORDER SHORTENING TIME FOR SERVING MOTION—February 17, 1953

Upon motion of the United States Attorney, good cause appearing therefor, it is ordered that the time for serving the foregoing motion is shortened to 5:00 P.M., Tuesday, February 17, 1953, service to be made by depositing a copy of said motion in the United States mails, properly addressed to counsel for the plaintiff, on or before the time last mentioned.

Done at San Francisco, California, February 17, 1953.

GEORGE B. HARRIS,
United States District Judge.

21 [File endorsement omitted]

In United States District Court

[Title omitted]

AFFIDAVIT OF KEENE WATKINS—Filed February 26, 1953

STATE OF CALIFORNIA,
County of Los Angeles, ss.:

Keene Watkins, being first duly sworn, deposes and says:

(1) He is a partner of the law firm of Latham & Watkins, General Counsel for Grand Central Aircraft Co., the plaintiff in the above entitled action (hereinafter called the "Company"), and is familiar with the Company's business, operations, and financial condition. The Company is now and has been since 1950 engaged in vital defense work under contract with the United States Air Force. The Company is presently engaged in the modification of Boeing B-47 Jet Bombers at its Tucson plant. Prior to performing work

BLEED THROUGH

BLURRED COPY

on the B-47's, the Tucson plant was engaged in the reconditioning modification and overhaul of B-29 bombers which were re-activated on the outbreak of the Korean War.

22 (2) The Company is a party to a V-Loan Credit Agreement under the Defense Production Act of 1950, with three Los Angeles banks. This agreement is dated August 24, 1951, and has been extended to and including September 30, 1953. Under said agreement the Company is able to obtain loans, the proceeds of which are being used for working capital in connection with its defense production contracts. The principal part of the Company's working capital has been, is being, and must be regularly supplied by these loans.

The Company has assigned its defense production contracts to said banks and payments made thereunder are deposited by said banks in a collateral account. The Company may withdraw funds from this collateral account upon presentation of a loan base supporting the then existing loan. The Company must have in accounts receivable and work in progress 110% of the then outstanding loan in order to withdraw. Weekly withdrawals from this collateral account have been made and are being made by the Company, or a new loan is made when the collateral account does not contain sufficient money to allow the withdrawal as indicated on the loan base. Said credit arrangement enables the Company to pay its weekly payroll and its other costs of production. Without such a credit arrangement the Company would be unable to perform its obligations under the Air Force contracts.

As a condition precedent to obtaining each weekly loan or withdrawal the Company is obligated to make certain representations or warranties. One of such warranties and representations is that there are no suits or proceedings pending or threatened against the Company "which would have a material adverse affect upon the financial condition or business of the Company." If the Company is unable to make this certification, under the agreement the banks may refuse to grant the requested loan or withdrawal. As set forth above, the Company, in order to fulfill its obligations under
23 its Air Force contracts, must be in a position to request loans and/or withdrawals under this agreement. The Company will suffer irreparable damage if it is unable to obtain weekly loans and/or withdrawals under said credit agreement.

(3) Under the said V-Loan Credit Agreement the Company is further obligated to maintain a tangible net worth of not less than $1,000,000. If the Company's tangible net worth should fall below the stated amount and the Company is unable to remedy this situation within 30 days after notice, the banks have the right to declare a default, whereupon the obligation of the banks to make loans is terminated and all notes issued by the Company to the

banks immediately become due and payable. As of January 4, 1953, the tangible net worth of the Company, computed in accordance with said agreement, amounted to $1,759,671.01.

(4) The claimed amount of disallowance, that is, wages allegedly paid in contravention to General Wage Stabilization Regulation No. 1, as computed by the Regional Counsel for the Twelfth Region Wage Stabilization Board, under General Order No. 15 of the Economic Stabilization Agency, is $5,561,484.11. If the National Enforcement Commission certifies, or even if the Enforcement Commissioner recommends, an income tax disallowance of the total, or any substantial part thereof, of the wage costs incurred by the Company which are alleged to have been paid in violation of General Wage Stabilization Regulation No. 1, said recommendation or certification of disallowance will reduce the Company's tangible net worth far below the figure of $1,000,000, and would result in the banks declaring a default and refusing to make further loans.

(5) The Company is further required under said V-Loan Credit Agreement to pay all taxes and assessments prior to penalty
24 date unless contested in good faith by the Company in appropriate proceedings. Any income tax disallowance certified by the National Enforcement Commission would not be subject to contest in any proceeding under the regulations issued by said Commission and the Economic Stabilization Administrator. Therefore, should an income tax disallowance of these wage costs, or any substantial part thereof, be certified by the National Enforcement Commission, the Company, in order to prevent all notes issued under the credit agreement from becoming immediately due and payable and its right to receive additional loans terminated, would have to pay, without challenge, the income tax assessed as the result of such disallowance, even though the disallowance was unconstitutional and improper under the law. There is grave doubt that payment of the income tax which would become due as a result of a disallowance of said wage costs, or any substantial part thereof, would be possible by the Company, and such payment would force the Company to cease operating.

(6) The Company is almost exclusively engaged in vital defense work under certain contracts with the United States Air Force. Said contracts contain definite schedules of required production and delivery. The Air Force has the right under the terms of said contracts to cancel said contracts if the production schedules are not met. It has the further right to charge the Company for the expense in moving the operations under such contracts to another contractor.

(7) Of necessity, the witnesses who will testify on behalf of the Company in any National Enforcement Commission hearing will be top level production supervisors. Their absence from the plant will substantially impair the Company's ability to meet the strict

BLEED THROUGH

BLURRED COPY

production schedules contained in said contracts with the Air Force. Any such impairment will cause irreparable damage to the Company.

25 (8) If said enforcement hearing proceeds, the Company will be forced to incur costs consisting of witnesses' time, transportation, lodging, attorneys' fees, etc., which costs will exceed $10,000.00.

KEENE WATKINS.

Subscribed and sworn to before me this 19th day of February, 1953.

LILLIAN S. FOLTZ,
Notary Public in and for the County of Los Angeles, State of California.

26 ORDER CONVENING THREE-JUDGE COURT—March 11, 1953

Whereas, in my judgment the public interest so requires, I, pursuant to the provisions of Section 2284 of Title 28, United States Code, do hereby designate and appoint the Honorable Clifton Mathews, United States Circuit Judge for the Ninth Judicial Circuit, and the Honorable Louis E. Goodman, United States District Judge for the Northern District of California, to sit with the Honorable Monroe M. Friedman, United States District Judge for the Northern District of California, and to hold the District Court for the Northern District of California, Southern Division, at San Francisco, California, on the 20th day of March, 1953, at 10:00 A.M., and to hear and determine the following cause: Grand Central Aircraft Co., a California Corporation, vs. Arthur P. Allen, Chairman Twelfth Region Wage Stabilization Board, et al., No. 32541.

Dated at San Francisco, California, this 11th day of March, 1953.

(S.) WILLIAM DENMAN,
Chief Judge, United States Court of Appeals, Ninth Judicial Circuit.

[File endorsement omitted.]

27 In United States District Court

[Title omitted]

TEMPORARY RESTRAINING ORDER—March 20, 1953

Plaintiff's motion for an interlocutory injunction and Defendants' motion to dismiss were this day argued before this Court. Said motions were submitted to the Court for decision and the Court has taken said matters under advisement.

28 Good cause appearing, it is hereby ordered that, pending the decision by this Court in said matters and until the further order of this Court, the Defendants Arthur P. Allen, Chairman Twelfth Region Wage Stabilization Board, Rudolph F. Hernried, Member Twelfth Region Wage Stabilization Board, Ernest A. Norbach, Twelfth Region Counsel, Joseph I. Nachman, Chief of Rulings and Opinions Branch Twelfth Region Wage Stabilization Board, Jerome Smith, Chief Enforcement Attorney, Twelfth Region Wage Stabilization Board, and Phil C. Neal, Enforcement Commissioner, and each of them, and their agents, servants, attorneys, and successors in office are hereby restrained and enjoined from prosecuting, hearing any charges brought against, or otherwise proceeding against Plaintiff in case No. 12-122 now pending before the National Enforcement Commission or with respect to any alleged violations of the Defense Production Act of 1950 as originally enacted and as amended, or of any regulations or orders issued pursuant thereto.

Dated: March 20, 1953.

(S.) CLIFTON MATHEWS,
United States Circuit Judge.
(S.) LOUIS E. GOODMAN,
United States District Judge.
(S.) MONROE M. FRIEDMAN,
United States District Judge.

[File endorsement omitted.]

29 [File endorsement omitted]

In United States District Court

[Title omitted]

MOTION TO VACATE TEMPORARY RESTRAINING ORDER—Filed April 3, 1953

Now come the defendants and move that the Temporary Restraining Order, issued in this cause on March 20, 1953, be vacated, on condition that no certification of disallowance under Section 405(b) of the Defense Production Act of 1950, as amended, shall be issued against plaintiff herein prior to the final conclusion of this litigation or two weeks after final determination in the enforcement proceedings now pending against plaintiff before the National Enforcement Commission of the Economic Stabilization Agency. (NEC #12-122).

BLEED THROUGH

BLURRED COPY

The Court is respectfully referred to the memorandum filed in support of this motion.

Respectfully submitted,

CHAUNCEY F. TRAMUTOLO,
United States Attorney.
CHARLES E. COLLETT,
Assistant United States Attorney.

30 In United States District Court

[Title omitted]

ORDER DENYING MOTION OF DEFENDANTS TO VACATE TEMPORARY RESTRAINING ORDER—May 11, 1953

The motion of defendants to vacate temporary restraining order heretofore made on March 20, 1953, was regularly heard before this Court on May 1, 1953.

Good cause appearing, it is hereby ordered that the motion of defendants to vacate said temporary restraining order is hereby denied.

Dated: May 11, 1953.

31 (S.) CLIFTON MATHEWS,
United States Circuit Judge.
(S.) LOUIS E. GOODMAN,
United States District Judge.
(S.) MONROE M. FRIEDMAN,
United States District Judge.

[File endorsement omitted.]

32 [File endorsement omitted]

In United States District Court

[Title omitted]

MEMORANDUM ORDER FOR INTERLOCUTORY INJUNCTION—May 11, 1953

The Court finds as follows:

1. That there are grave and important questions of law and of fact to be determined upon a trial of this cause by the
33 Court.

2. That if an interlocutory injunction is not granted pending the final determination of this cause, plaintiff will suffer great and irreparable damage without any adequate remedy at law therefor.

It is therefore ordered that an interlocutory injunction issue, with bond in the sum of One Thousand ($1,000.00) Dollars, with the usual conditions.

Plaintiff will present proposed interlocutory injunction according to the provisions of Rule 5(e) of Rules of Practice.

Dated: May 11, 1953.

CLIFTON MATHEWS,
United States Circuit Judge.

LOUIS E. GOODMAN,
United States District Judge.

MONROE M. FRIEDMAN,
United States District Judge.

34 [File endorsement omitted]

In United States District Court

[Title omitted]

RESERVATION OF DECISION ON MOTION TO DISMISS COMPLAINT—May 28, 1953

The motion of the defendants, Arthur P. Allen, Rudolph F. Hernried, Ernest A. Norback, Joseph I. Nachman, Jerome
35 Smith, and Phil C. Neal to dismiss the Complaint upon certain grounds set forth in said motion came on regularly to be heard on March 20, 1953, before this District Court consisting of the Honorable Clifton Mathews, United States Circuit Judge, the Honorable Louis E. Goodman, United States District Judge, and the Honorable Monroe M. Friedman, United States District Judge.

It is hereby ordered that in accordance with Rule 12 of Federal Rules of Civil Procedure, this Court postpones its disposition of said motion to dismiss until the trial on the merits, and that the defendants shall file their Answer or other responsive pleading herein within ten (10) days after notice of this order.

Dated: May 28, 1953.

CLIFTON MATHEWS,
United States Circuit Judge.

LOUIS E. GOODMAN,
United States District Judge.

MONROE M. FRIEDMAN,
United States District Judge.

BLEED THROUGH

BLURRED COPY

36 [File endorsement omitted]

In United States District Court

[Title omitted]

INTERLOCUTORY INJUNCTION—May 28, 1953

The petition of plaintiff for interlocutory injunction came on regularly to be heard before the above entitled District Court,
37 consisting of the Honorable Clifton Mathews, United States Circuit Judge, the Honorable Louis E. Goodman, United States District Judge, and the Honorable Monroe M. Friedman, United States District Judge, on March 20, 1953, and on May 1, 1953.

Messrs. Latham and Watkins and R. W. Lund, Esq., appeared as attorneys for plaintiff. Chauncey Tramutolo, Esq., former United States Attorney, Lloyd H. Burke, Esq., United States Attorney, Charles Elmer Collett, Esq., Assistant United States Attorney, Ernest H. Norback, Esq., Regional Counsel Joseph I. Nachman, Esq., Attorney for Wage Stabilization Board, and Isaac Groner, Esq., Chief Counsel for Wage Stabilization Committee, appeared as attorneys for defendants Arthur P. Allen, Rudolph Hernried, Ernest A. Norback, Joseph I. Nachman, Jerome Smith, and Phil C. Neal.

Argument was presented by all parties, and the matter was submitted to the Court for its decision. And now, the Court, being fully advised in the premises, does make its order for interlocutory injunction as follows:

The Court finds that there are grave and important questions of law and of fact to be determined upon a trial of this cause by the Court.

The Court finds further that if an interlocutory injunction is not granted, plaintiff will suffer great and irreparable damage without any adequate remedy at law therefor.

It is hereby ordered that during the pendency of this action and until the further order of this Court, the defendants Arthur P. Allen, Chairman Twelfth Region Wage Stabilization Board, Rudolph Hernried, Member Twelfth Region Wage Stabilization Board, Ernest A. Norback, Twelfth Region Counsel, Joseph I. Nach-
38 man, Chief of Rulings and Opinions Branch Twelfth Region Wage Stabilization Board, Jerome Smith, Chief Enforcement Attorney, Twelfth Region Wage Stabilization Board, and Phil C. Neal, Enforcement Commissioner, and each of said defendants, and their agents, servants, attorneys, and successors in office are hereby restrained and enjoined from prosecuting, hearing any charges brought against, or otherwise proceeding against plaintiff in Case No. 12-122 now pending before the said National Enforcement

Commission or with respect to any alleged violations of the Defense Production Act of 1950, as originally enacted and as amended, or of any regulations or orders issued pursuant thereto.

It is further ordered that plaintiff file its bond, to be approved by the court, in the sum of $1,000.00, conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Dated: May 28, 1953.

CLIFTON MATHEWS,
United States Circuit Judge.
LOUIS E. GOODMAN,
United States District Judge.
MONROE M. FRIEDMAN,
United States District Judge.

39-40 Bond on appeal for $1,000.00 approved and filed June 4, 1953, omitted in printing.

41 UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO COMPLAINT—Filed June 12, 1953

[File endorsement omitted]

Now come defendants, and without waiving the motion to dismiss the complaint heretofore filed by defendants, answer the allegations of the complaint as follows:

1. Defendants admit the allegations of Paragraph I.

2. Defendants admit the allegations of the first sentence of Paragraph II. For lack of knowledge and information sufficient to form a belief, defendants deny the allegations of the second sentence of Paragraph II.

3. Defendants admit the allegations of the first sentence of Paragraph III. In answer to the second sentence of Paragraph III, defendants affirmatively state that the Wage Stabilization Board established by Section 403(b) of the Defense Production Act of 1950 as amended by Section 112 of the Defense Production Act Amendments of 1952 (Act of June 30, 1952, c. 530, 66 Stat. 296) succeeded the Wage Stabilization Board established by Executive Order 10161 of September 9, 1950, as amended (15 F. R. 6105, 16 F. R. 3503, 11257). Defendants admit the allegations of the third sentence of Paragraph III. In answer to the allegation of the fourth sentence of Paragraph III, defendants affirmatively state

BLEED THROUGH

BLURRED COPY

that Regional Wage Stabilization Boards were established in 1951 before the Defense Production Act Amendments of 1952 and continued in existence after passage of the 1952 Amendments. In answer to the fifth sentence of Paragraph III, defendants admit that on or about December 6, 1952 the Industry Members of the National Wage Stabilization Board submitted their resignations to the President. In answer to the sixth sentence of Paragraph III, defendants state that on December 15, 1952, the Economic Stabilization Administrator issued General Order No. 19 (17 F.R.
42 11368) establishing the Wage Stabilization Committee and providing for its membership and functions. In answer to the last sentence of Paragraph III, defendants affirmatively state that on December 15, 1953, the Wage Stabilization Committee adopted Resolution No. 1 (17 F.R. 11599) ratifying, confirming and adopting all prior actions of the Wage Stabilization Board "or of any of its agents or agencies or the Economic Stabilization Administrator, except that, while any tripartite 'Board Agency' is rendered inoperative, it shall be composed of three members representative of the general public."

4. In answer to Paragraph IV, defendants allege: defendant Arthur P. Allen was, until March 31, 1953, the Chairman, and defendant Rudolph F. Hernried was, until March 6, 1953, a member, of the Wage Stabilization Board for the Twelfth Region. On the respective dates noted, defendants Allen and Hernried were terminated as such chairman and member, respectively, and since that date have had no power or authority in connection with the matters alleged in the complaint. The correct name of defendant "Norbach" is "Ernest H. Norback", and he is the Regional Counsel for the Wage Stabilization Board for the Twelfth Region. Defendant Joseph I. Nachman and defendant Jerome Smith were, until May 31, 1953, Chief Counsel of the Rulings and Opinions Branch and Chief Enforcement Attorney, respectively, of the Wage Stabilization Board for the Twelfth Region. On May 31, 1953, defendants Nachman and Smith were terminated as Chief of the Rulings and Opinions Branch and Chief Enforcement Attorney of the Wage Stabilization Board for the Twelfth Region, and since that date have had no power or authority in connection with the matters alleged in the complaint. Defendants Killingsworth, Enarsen and Lazarus were Chairman and Members, respectively, of the Wage Stabilization Committee until March 13, 1953. Defendant Ryder was a Member of the Wage Stabilization Committee until February 12, 1953. As of said respective dates said defendants resigned from said respective positions and since said dates have had no power or authority in connection with the matters alleged in the complaint. Defendants Killingsworth, Enarson, Lazarus and Ryder are not residents of California but, on the contrary, during their

incumbency in office were officially resident in the District of Columbia and are not subject to suit in this court and were not served with process. Defendant Groner is Chief Counsel
43 for the Wage Stabilization Board. Defendant Groner is not a resident of California but is, on the contrary, officially resident in the District of Columbia and is not subject to suit in this court and was not served with process.

5. Defendants admit the allegations of Paragraph V and allege affirmatively that the National Enforcement Commission was given power in fact and in law to determine the amount of wages, salaries or other compensation paid in violation of regulations promulgated pursuant to the Defense Production Act of 1950, as amended, and to certify to other governmental agencies the amount of such payments or accruals of wages, salaries or other compensation to be disregarded and disallowed for the purpose of calculating or determining deductions, gains, costs or expenses under other laws or regulations.

6. In answer to Paragraph VI, defendants allege: Charles O. Gregory, Helen F. Humphrey and Ralph F. Fuchs were Chairman and Members of the National Enforcement Commission through May 31, 1953. Defendant Lawson F. Bernstein was Counsel and Alternate Member of the National Enforcement Commission through May 31, 1953. As of May 31, 1953, defendants Gregory, Humphrey and Fuchs resigned as such chairman and members and since that date have had no power or authority in connection with the matters alleged in the complaint. As of May 31, 1953, defendant Bernstein resigned as Counsel and Alternate Member of the National Enforcement Commission, and on June 1, 1953 became a member of said Commission. Defendants Gregory, Humphrey, Fuchs and Bernstein are not residents of California but, on the contrary, during their incumbency in office were, and defendant Bernstein is, officially resident in the District of Columbia, and are not subject to suit in this court and were not served with process.

7. Defendants do not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph VII.

8. Defendants admit the allegation of the first sentence of Paragraph VIII. Defendants deny the allegations of the second sentence of Paragraph VIII.

9. Defendants admit the allegations in Paragraph IX.

10. Defendants admit the allegations contained in Paragraph K.

11. In answer to Paragraph XI, defendants affirmatively state that defendants Groner and Norback presently intend that the pending enforcement proceeding be prosecuted to final deter-
44 mination. Defendants deny that the other defendants named in Paragraph XI threaten to prosecute said complaint before the National Enforcement Commission.

BLEED THROUGH

BLURRED COPY

12. In answer to Paragraph XII, defendants state that the National Enforcement Commission intends to conduct the proceedings pending against Plaintiff to final determination. Defendants deny that named defendants Humphrey and Fuchs threaten to conduct a hearing on the allegations of the said complaint and to render decision thereafter.

13. Defendants deny the allegations of Paragraph XIII and XIV.

ADDITIONAL DEFENSES

1. The court has no jurisdiction over defendants Charles C. Killingsworth, H. L. Enarson, Herman Lazarus, Meyer S. Ryder, Charles O. Gregory, Helen F. Humphrey, Ralph Fuchs, Lawson F. Bernstein and Isaac Groner in that they are not residents of California.

2. The case is moot as to defendants Arthur P. Allen, Rudolph F. Hernried, Joseph I. Nachman, Jerome Smith, Charles C. Killingsworth, H. L. Enarson, Herman Lazarus, Meyer S. Ryder, Charles O. Gregory, Helen F. Humphrey and Ralph F. Fuchs.

3. The court lacks jurisdiction of this action in that there is an absence of indispensable parties, i.e. the members of the National Enforcement Commission.

4. The court lacks jurisdiction of the action in that plaintiff has failed to exhaust its administrative remedies.

5. The complaint fails to state a claim upon which any relief can be granted.

6. The complaint fails to state a claim upon which any injunctive relief can be granted in that there is no showing of threatened irreparable injury to plaintiff.

LLOYD H. BURKE,
United States Attorney.

CERTIFICATE OF SERVICE (OMITTED IN PRINTING)

45 IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF ASSOCIATION OF COUNSEL—Filed June 26, 1953

To the United States Attorney, LLOYD H. BURKE, Attorney for Defendants:

Please take notice that the firm of Littler, Lauritzen & Mendelson, attorneys at law, 593 Market Street, San Francisco 5, California,

has been retained by plaintiff's attorneys as associate counsel in the above-entitled case.

Dated: June 24, 1953.

LATHAM & WATKINS,
By (S.) R. W. LUND,
Attorneys for Plaintiff.

(Affidavit of Mailing)

[File endorsement omitted]

46 [File endorsement omitted]

In United States District Court

[Title omitted]

STIPULATION FOR AMENDMENT OF COMPLAINT AND FOR SERVICE AND FILING OF SUPPLEMENTAL COMPLAINT—Filed July 20, 1953

It is hereby stipulated by and between counsel for the parties hereto that Plaintiff may file the amendment to the complaint attached hereto, and service of a copy thereof is hereby accepted. Each and every allegation therein is deemed denied by defendants.

It is further stipulated by and between counsel for the parties hereto that Plaintiff may file the supplemental complaint at-
47 tached hereto, and service of a copy thereof is hereby accepted. Each and every allegation therein is deemed denied by defendants.

Dated: July 20, 1953.

LATHAM & WATKINS,
LITTLER, LAURITZEN & MENDELSON,
By ROBERT LITTLER,
Attorney for Plaintiff.
LLOYD H. BURKE,
United States Attorney.
By GEORGE A. BLACKSTONE,
Asst. United States Attorney,
Attorneys for Defendants.

BLEED THROUGH

BLURRED COPY

48 IN UNITED STATES DISTRICT COURT

[Title omitted]

FIRST AMENDMENT TO COMPLAINT FOR PRELIMINARY AND PERPETUAL INJUNCTION—Filed July 20, 1953

Plaintiff, in accordance with Rule 15(a) of the Federal Rules of Civil Procedure, amends its complaint in the above entitled action as follows:

49 (1) That there is added to paragraph XIII of said complaint the following subparagraph (h), which reads as follows:

"(h) Neither the National Enforcement Commission nor the Wage Stabilization Board or their respective members, attorneys, agents, or employees have ever had and do not now have authority to determine whether wage or salary payments were made in contravention of the Defense Production Act of 1950, as amended (hereinafter called 'the Act'), in that

"(1) The Act does not vest in the President or any official, board, commission or agency of the Executive Branch, the power to determine whether or not any wage or salary payments were made in contravention of the Act or regulations or orders thereunder for the purpose of disallowing such payments under other laws and regulations, or for any other purpose.

"(2) The purported delegation by the Economic Stabilization Administrator to the National Enforcement Commission and the purported assumption by said Commission of independent jurisdiction, authority, and power to make final and conclusive determinations which were purportedly nonreviewable and which, upon certification by the Commission, were purportedly binding upon other governmental agencies, was invalid, in violation of the Act and void.

"(3) Proceedings to establish a violaton of wage or salary stabilization regulations or orders have been and are cognizable, and cognizable only, in the district courts of the United States, in suits, actions or prosecutions in-
50 stituted under the supervision and control of the Attorney General of the United States.

"(4) While the expiration on April 30, 1953, of Title IV of the Act relating to wage and salary stabilization, terminated all authority of the defendants and of every other official, board, commission or agency of the Executive Branch, as above alleged, there was, nevertheless, reserved

to the district courts of the United States continued jurisdiction in suits, actions or prosecutions under the supervision and control of the Attorney General, with respect to alleged violations of wage and salary stabilization regulations alleged to have been committed prior to May 1, 1953 and with respect to liabilities, if any, resulting therefrom."

(2) That lines 10 through 31, page 10, paragraph XV, and lines 1 and 2, page 11, of said paragraph XV, are hereby stricken and in place thereof the following is inserted:

"(a) Plaintiff is now and has been since 1950 engaged in vital defense work under contract with the United States Air Force. Plaintiff is presently engaged in the modification of Boeing B-47 Jet Bombers at its Tucson plant. Prior to performing work on the B-47's the Tucson plant was engaged in the reconditioning, modification, and overhaul of B-29 bombers which were re-activated on the outbreak of the Korean War.

"(b) Plaintiff is a party to a V-Loan Credit Agreement under the Defense Production Act of 1950, with three Los Angeles banks. This Agreement is dated August 24, 1951, and has been extended to and including September 30, 1953.

Under said agreement Plaintiff is able to obtain loans,
51 the proceeds of which are being used for working capital in connection with its defense production contracts. The principal part of Plaintiff's working capital has been, is being, and must be regularly supplied by these loans.

Plaintiff has assigned its defense production contracts to said banks and payments made thereunder are deposited by said banks in a collateral account. Plaintiff may withdraw funds from this collateral account upon presentation of a loan base supporting the then existing loan. Plaintiff must have in accounts receivable and work in progress 110% of the then outstanding loan in order to withdraw. Weekly withdrawals from this collateral account have been and are being made by Plaintiff, or a new loan is made when the collateral account does not contain sufficient money to allow the withdrawal as indicated on the loan base. Said credit arrangement enables Plaintiff to pay its weekly payroll and its other costs of production. Without such a credit arrangement Plaintiff would be unable to perform its obligations under the Air Force contracts. Plaintiff will suffer irreparable damage if it is unable to obtain weekly loans and/or withdrawals under said credit agreement.

"(c) Under said V-Loan Credit Agreement Plaintiff is further obligated to maintain a tangible net worth of not less than $1,000,000. If Plaintiff's tangible net worth should

BLEED THROUGH

BLURRED COPY

fall below the stated amount and Plaintiff is unable to remedy this situation within 30 days after notice, the banks have the right to declare a default, whereupon the obligation of
52 the banks to make loans is terminated and all notes issued by Plaintiff to the banks immediately become due and payable. As of January 4, 1953, the tangible net worth of Plaintiff, computed in accordance with said agreement, amounted to $1,759,671.01.

"(d) The claimed amount of disallowance, that is, wages allegedly paid in contravention to General Wage Stabilization Regulation No. 1, as computed by the Regional Counsel for the Twelfth Region Wage Stabilization Board, under General Order No. 15 of the Economic Stabilization Agency, is $5,561,484.11. If the National Enforcement Commission certifies, or even if the Enforcement Commissioner recommends, an income tax disallowance of the total, or any substantial part thereof, of the wage costs incurred by Plaintiff which are alleged to have been paid in violation of General Wage Stabilization Regulation No. 1, said recommendation or certification of disallowance will reduce Plaintiff's tangible net worth far below the figure of $1,000,000, and would result in the banks declaring a default and refusing to make further loans.

"(e) Plaintiff is further required under said V-Loan Credit Agreement to pay all taxes and assessments prior to penalty date unless contested in good faith by Plaintiff in appropriate proceedings. Any income tax disallowance certified by the National Enforcement Commission would not be subject to contest in any proceeding under the regulations issued by said Commission and the Economic Stabilization Administrator. Therefore, should an income tax disallowances of these
53 wage costs, or any substantial part thereof, be certified by the National Enforcement Commission, Plaintiff, in order to prevent all notes issued under the credit agreement from becoming immediately due and payable and its right to receive additional loans terminated, would have to pay, without challenge, the income tax assessed as the result of such disallowance, even though the disallowance was unconstitutional and improper under the law. There is grave doubt that payment of the income tax which would become due as a result of a disallowance of said wage costs, or any substantial part thereof, would be possible by Plaintiff, and such payment would force Plaintiff to cease operating.

"(f) Plaintff is almost exclusively engaged in vital defense work under certain contracts with the United States Air Force. Said contracts contain definite schedules of required production and delivery. The Air Force has the right under the

terms of said contracts to cancel said contracts if the production schedules are not met. It has the further right to charge Plaintiff for the expense in moving the operations under such contracts to another contractor.

"(g) Of necessity, the witnesses who will testify on behalf of Plaintiff in any National Enforcement Commission hearing will be top level production supervisors. Their absence from the plant will substantially impair Plaintiff's ability to meet the strict production schedules contained in said contracts with the Air Force. Any such impairment will cause irreparable damage to Plaintiff.

54 "(h) Plaintiff's employees and officers will be required to spend large amounts of time at great cost to plaintiff in gathering and presenting date and acting as witnesses for the purposes of Plaintiff's defense. Plaintiff will also be required to retain counsel at further cost to Plaintiff. If said enforcement hearing proceeds, such costs will exceed $10,000. All of said expenses incident to the conduct to avoid proceeding before the National Enforcement Commission will be irrevocably lost to Plaintiff.

"(i) Plaintiff will be threatened for an extended period of time with the retroactive disallowance by one or more government agencies of the entire amount of wages paid to its employees during the period of almost a year which is brought into question by said complaint. Said contingent liability will prevent Plaintiff from entering into contracts and conducting and expanding its business in normal fashion until said liability is determined.

"(j) Any order issued by the said Commission certifying disallowance of Plaintiff's costs to one or more government agencies will require said agencies to make the said disallowance at great cost to Plaintiff, although Plaintiff will be unable to attack such action before said agencies or before any court."

Dated: July 13, 1953.

LATHAM & WATKINS and LITTLER,
LAURITZEN & MENDELSON,
By R. W. LUND,
Attorneys for Plaintiff,
Grand Central Aircraft Co.

55 *Duly sworn to by S. Carpenter. Jurat omitted in printing.*

BLEED THROUGH

BLURRED COPY

56 IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL COMPLAINT FOR PERPETUAL INJUNCTION—Filed July 20, 1953

Plaintiff, Grand Central Aircraft Co., by leave of Court first had and obtained, brings this its Supplemental Complaint herein and alleges as follows:

I

Since the filing of the original complaint herein the following material facts have occurred:

A. The expiration, on April 30, 1953, of Title IV of the Act, relating to wage stabilization, terminated all authority conferred thereunder, and thus terminated any power or authority which the President, the National Enforcement Commission, or any other official, board, or agency of the Executive Branch may theretofore have had either to determine whether or not wage or salary payments had been made in contravention of the Act or to
57 determine the extent to which any such wage or salary payments should be disallowed for the purpose of other laws or regulations.

B. None of the defendants has any authority, jurisdiction or power to prosecute, hear or determine any complaint against the plaintiff alleging that it made payments in contravention of Wage Stabilization Board regulations or orders or that any such payments should be disallowed for the purposes of any other law or regulation.

WHEREFORE, plaintiff prays that the relief prayed for in the original complaint herein be granted.

Dated: July 13, 1953.

LATHAM & WATKINS and LITTLER, LAURITZEN & MENDELSON,
By R. W. LUND,
Attorneys for Plaintiff.

58 *Duly sworn to by R. W. Lund. Jurat omitted in printing.*

59 IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING AMENDMENT OF COMPLAINT AND APPROVING SERVICE AND FILING OF SUPPLEMENTAL COMPLAINT PURSUANT TO STIPULATION—Filed July 20, 1953

Upon reading and considering the Stipulation by and between the attorneys for the respective parties herein and upon the request of Plaintiff, it is

Ordered that Plaintiff may amend its Complaint herein in the form annexed to said Stipulation and that said Complaint is hereby amended accordingly and each and every allegation in the Amendment of Complaint is deemed denied pursuant to said Stipulation.

Further ordered that receipt of service of the Supplemental Complaint in the form annexed to said Stipulation having been acknowledged by Defendants in said Stipulation, the service of and filing herein of said Supplemental Complaint is ap-
60 proved and each and every allegation therein is deemed denied pursuant to said Stipulation.

Dated: July 20th, 1953.

(S.) CLIFTON MATHEWS,
Judge of the United States,
Court of Appeals.

(S.) LOUIS E. GOODMAN,
United States District Judge.

(S.) MONROE M. FRIEDMAN,
United States District Judge.

[File endorsement omitted]

BLEED THROUGH

BLURRED COPY

61 [File endorsement omitted]

In United States District Court for the Northern District of California, Southern Division

No. 32541

GRAND CENTRAL AIRCRAFT CO., A CALIFORNIA CORPORATION, PLAINTIFF,

vs.

ARTHUR P. ALLEN, Chairman, Twelfth Region Wage Stabilizaton Board; RUDOLPH F. HERNRIED, Member Twelfth Region Wage Stabilization Board; ERNEST A. NORBACH, Twelfth Region Counsel, JOSEPH I. NACHMAN, Chief of Rulings and Opinions Branch Twelfth Region Wage Stabilization Board; JEROME SMITH, Chief Enforcement Attorney, Twelfth Region Wage Stabilization Board; CHARLES C. KILLINGSWORTH, Chairman Wage Stabilization Committee; H. L. ENARSON, HERMAN LAZARUS and MEYER S. RYDER, Members of Wage Stabilization Committee; PHIL C. NEAL, Enforcement Commissioner; CHARLES O. GREGORY, Chairman National Enforcement Commission; HELEN F. HUMPHREY, RALPH F. FUCHS and LAWSON F. BERNSTEIN, Members of National Enforcement Commission; ISAAC GRONER, Chief Counsel for Wage Stabilization Committee; DOE ONE, DOE TWO, DOE THREE, DOE FOUR, DOE FIVE, and DOE SIX, DEFENDANTS

JUDGMENT OF PERMANENT INJUNCTION—July 31, 1953

The petition of plaintiff for permanent injunction came on regularly to be heard on July 24, 1953, before the above entitled District Court, consisting of the Honorable Clifton Mathews, United
62 States Circuit Judge, the Honorable Louis E. Goodman, United States District Judge, and the Honorable Monroe M. Friedman, United States District Judge.

All parties appeared by counsel, and the Court heard the evidence and the arguments of counsel, and briefs were filed by the parties; the matter was submitted to the Court for its decision.

Upon due consideration thereof, it appears to the Court, for the reasons stated in the Opinion filed, that petitioner should be granted the relief prayed for in its petition. Findings of Fact and Conclusions of Law have heretofore been filed.

It is hereby ordered, adjudged and decreed that the defendants Arthur P. Allen, Chairman, Twelfth Region Wage Stabilization Board, Rudolph Hernried, Member Twelfth Region Wage Stabiliza-

tion Board, Ernest A. Norbach, Twelfth Region Counsel, Joseph I. Nachman, Chief of Rulings and Opinions Branch Twelfth Region Wage Stabilization Board, Jerome Smith, Chief Enforcement Attorney, Twelfth Region Wage Stabilization Board, and Phil C. Neal, Enforcement Commissioner, and each of said defendants, and their agents, servants, attorneys, and successors in office are hereby permanently restrained and enjoined from prosecuting, hearing any charges brought against, or otherwise proceeding against plaintiff in Case No. 12-122 now pending before the said National Enforcement Commission or with respect to any alleged violations of the Defense Production Act of 1950, as originally enacted and as amended,
63 or of any regulations or orders issued pursuant thereto.

Dated: July 31, 1953.

CLIFTON MATHEWS,
United States Circuit Judge.

LOUIS E. GOODMAN,
United States District Judge.

MONROE M. FRIEDMAN,
United States District Judge.

BLEED THROUGH

BLURRED COPY

64 [File endorsement omitted]

In United States District Court for the Northern District of California, Southern Division

No. 32541

GRAND CENTRAL AIRCRAFT CO., a California Corporation, PLAINTIFF

vs.

ARTHUR P. ALLEN, Chairman, Twelfth Region Wage Stabilization Board; RUDOLPH F. HERNREID, Member Twelfth Region Wage Stabilization Board; ERNEST A. NORBACH, Twelfth Region Counsel; JOSEPH I. NACHMAN, Chief of Rulings and Opinions and Branch Twelfth Region Wage Stabilization Board; JEROME SMITH, Chief Enforcement Attorney, Twelfth Region Wage Stabilization Board; CHARLES C. KILLINGSWORTH, Chairman Wage Stabilization Committee; H. L. ENARSON, HERMAN LAZARUS and MEYER S. RYDER, Members of Wage Stabilization Committee; PHIL C. NEAL, Enforcement Commissioner; CHARLES O. GREGORY, Chairman National Enforcement Commission; HELEN F. HUMPHREY, RALPH F. FUCHS and LAWSON F. BERNSTEIN, Members of National Enforcement Commission; ISAAC GRONER, Chief Counsel for Wage Stabilization Committee; DOE ONE, DOE TWO, DOE THREE, DOE FOUR, DOE FIVE and DOE SIX, DEFENDANTS

Messrs. Latham and Watkins and R. W. Lund, Esq., of Los Angeles, Calif., Attorneys for plaintiff.

Lloyd H. Burke, U. S. Attorney, Charles Elmer Collett, Assistant U. S. Attorney, George A. Blackstone, Assistant U. S. Attorney, Ernest A. Norbach, Twelfth Region Counsel, Joseph I. Nachman, Chief of Rulings and Opinions Branch Twelfth Region Wage
65 Stabilization Board, of San Francisco, Calif., and Isaac Groner, Chief Counsel for Wage Stabilization Committee, of Washington, D. C., for defendants.

Before MATHEWS, Circuit Judge, and GOODMAN and FRIEDMAN, District Judges

OPINION—July 31, 1953

FRIEDMAN, *Circuit Judge:*

This is an action to enjoin officials of the Wage Stabilization Board and of the National Enforcement Commission from continuing administrative proceedings against Grand Central Aircraft Company in Case No. 12-122 now pending before the Commission. The

charges brought by the Wage Stabilization Board in a Complaint filed on November 4, 1952, allege violations of Sec. 405(b) of the Defense Production Act of 1950, as amended, (50 U.S.C. App. 2105(b)) and of regulations and orders issued thereunder. Specifically, the Board alleged that Grand Central Aircraft Company had made wage payments to its employees in 1951 in contravention of General Wage Stabilization Regulation 1, popularly known as "the wage freeze", promulgated by the Economic Stabilization Administrator. A hearing on the allegations of that Complaint was set for February 24, 1953, before Enforcement Commissioner Phil C. Neal, at Los Angeles, California. On February 13, 1953, the company filed its Complaint in the District Court for the Northern District of Californa, Southern Division, against regional and national officials of the Wage Stabilization Board and of the National Enforcement Commission to enjoin them from proceeding with the administrative hearing. The administrative hearing was then postponed, pending judicial action. On February 17, 1953, the defendant officials moved to dismiss the Complaint. On March 11,

1953, a Three-judge Court was appointed, pursuant to 28

66 U.S.C. 2282; and after a hearing on March 20, 1953, the Court issued a Temporary Restraining Order directed against the regional officails who were within the Court's jurisdiction and took under advisement the company's motion for a preliminary injunction and the defendants' motion to dismiss the Complaint. On April 2, 1953, the defendants filed a motion to vacate the Temporary Restraining Order; the Three-judge Court heard argument on that motion and took the matter under advisement on May 1, 1953. On May 11, 1953, the Court issued a Memorandum Order for Interlocutory Injunction, finding that there were grave and important questions of law and fact to be determined on trial, and that if an Interlocutory Injunction were not granted, the company would suffer irreparable damage and ordered that an Interlocutory Injunction issue. On May 28, 1953, the Court issued the Interlocutory Injunction enjoining the regional officials of the Wage Stabilization Board and the Enforcement Commissioner from proceeding with the administrative proceedings upon conditions that plaintiff post bond in the sum of One Thousand ($1,000.00) Dollars for the payment of costs and damages, should it develop that any party was wrongfully enjoined. (The Court reserved decision on the motion to dismiss the Complaint.)

The Acting Solicitor General of the United States applied to the Supreme Court on June 5, 1953, for a stay of the Interlocutory Injunction granted by this Court; the Supreme Court denied the application on June 15, 1953. The case came on for trial before this Court on July 24, 1953, and was submitted that day.

BLEED THROUGH

BLURRED COPY

The undisputed evidence convincingly showed that the plaintiff would be irreparably damaged by the continuance of the administrative proceedings. The plaintiff is engaged in the recon-
67 ditioning of aircraft engines and equipment. It employs several thousand employees. Its plants are located in Southern California and Arizona. Over seventy-five per cent of its production is for defense purposes arising out of government contracts. During the course of the administrative proceedings, plaintiff was advised in writing by the representatives of the Enforcement Commission that it proposed to assess penalties by way of a recommendation of disallowance of deductons for tax purposes, if the evidence showed violation of the statute and regulations, in maximum amounts of from Two to Three Million Dollars. The testimony showed that the plaintiff had established a credit of Six Million Dollars with a group of Los Angeles banks and that its current borrowings were in the excess of One Million Dollars. The evidence further showed that the continuance of the administrative proceedings with the over-hanging threat of the disallowance penalties would cause the banks to withdraw the credit extended, resulting in a shut down of plaintiff's business, cancellation of its government contracts, and consequent bankruptcy. Without more, the evidence is persuasive as to irreparable damage.

Plaintiff urges several grounds which it claims legally justify the issuance of a permanent injunction, among them asserted Constitutional infirmities in the Defense Production Act of 1950. Since we are of the opinion that the cause can be justly decided without resolving the tendered Constitutional questions, we do not reach them.[1]

---

[1] It has long been an established legal policy that Courts should not unnecessarily determine Constitutional Issues. *Hurd* v. *Hodge*, 334 U.S. 24, 30, 68 S. Ct. 847, 92 L. Ed. 1187; *Rescue Army* v. *Municipal Court*, 1947, 331 U.S. 549, at Page 569, 67 S. Ct. 1409, 91 L. Ed. 1666; *Alma Motor Co.* v. *Timkin-Detroit Axle Co.*, 1946, 329 U.S. 129, 136, 67 S. Ct. 231, 91 L. Ed. 128; *Arkansas Fuel Co.* v. *State of Louisiana ex rel. Muslow*, 1938, 304 U.S. 197, 202, 58 S. Ct. 852, 82 L. Ed. 1287; *Baker* v. *Grice*, 1898, 169 U.S. 292, 18 S. Ct. 323, 42 L. Ed. 748.

There would appear to be no good reason why this doctrine should not apply to courts constituted as this one is. See *Morgan* v. *U. S.*, 107 F. Supp. 501, at 504, and also *United Air Lines, Inc.* v. *Public Utilities Commission*, 109 F. Supp. 13.

This Three-judge Court, having properly acquired jurisdiction, has power to pass upon non-constitutional questions involved in the suit. *Louisville & Nashville Railroad Co.* v. *Garrett*, 231 U.S. 298; *Fireman's Ins. Co.* v. *Beha D. C.*, 30 F. 2d 539; *United Air Lines, Inc.* v. *Public Utilities Commission, supra.*

Other substantial grounds are urged to support the judgment in favor of plaintiff: That (1) the savings clause in the general
68 statute (1 U.S.C. 109) does not cover this administrative proceeding; that (2) this is not a suit, action, or prosecution under the savings clause of the Defense Production Act of 1950 (50 U.S.C. App. 2156(b)); and that (3) the provisions for the termination of the Act provide only for a continued existence for a period not to exceed six months for purposes of liquidation, and that this administratve procedure is not part of the liquidation. (50 U.S.C. App. 2166(b)(3).) These contentions appear to have substantial merit, but we do not find it necessary to pass upon them.

It is sufficient to say that we are unable to perceive in the Defense Production Act any authority for the imposition of penalties by the National Enforcement Commission. To the contrary, the statute vests jurisdiction in the District Courts of the United States of all actions under the Act to enforce any liability or duty created thereby. (50 U.S.C. App. 2156(b).) It is true that the Act
69 authorizes the President to prescribe the *extent* to which any unauthorized payment made by an employer to any employee may be disregarded by the Executive Departments (such as the Treasury) in determining gain for tax purposes. (50 U.S.C. App. 2105(a).) But the statute nowhere vests in the President or in any delegated agency the power to actually impose penalties.

We unanimously conclude that a judgment for a permanent injunction as prayed should enter herein. See *Jones Aircraft Corporation* v. *Franklin, et al.*, No. 5122, District Court, Northern District of Texas, decided July 15, 1953, not yet reported.

Dated: July 31, 1953.

MONROE M. FRIEDMAN,
United States District Judge.

BLEED THROUGH

BLURRED COPY

70 [File endorsement omitted]

In United States District Court

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—July 31, 1953

The above entitled cause came on regularly for trial before the above entitled Court on July 24, 1953. Parties hereto appearing by their respective counsel, and the Court having heard evi-
71 dence and the testimony of witnesses and the arguments of counsel and briefs having been submitted.

Now therefore, upon due consideration, the Court makes the following:

FINDINGS OF FACT

1. The allegations of Paragraphs II, III, V, VI, VIII, IX, X, XI, and XII of plaintiff's Complaint are true.

2. Prosecution of the Complaint issued by the Wage Stabilization Board will cause irreparable damage to the plaintiff for the reasons stated in Paragraph XV of plaintiff's Complaint. The Court further finds that the continuance of the threatened administrative proceeding will cause plaintiff's bank credit to be shut off and will disable plaintiff from continuing its operations.

CONCLUSIONS OF LAW

The Court finds that there is no statutory authority for the imposition of penalties by the National Enforcement Commission and the threat of such enforcement will cause irreparable damage to the plaintiff and, therefore, a permanent injunction should be granted restraining the defendants from further prosecution of the proceeding against plaintiff in Case No. 12-122 now pending before the National Enforcement Commission with respect to any alleged violations of the Defense Production Act of 1950, as originally enacted and as amended, or of any regulations or orders issued pursuant thereto.

Let a permanent injunction issue forthwith.

Dated: July 31, 1953.

CLIFTON MATHEWS,
United States Circuit Judge.

LOUIS E. GOODMAN,
United States District Judge.

MONROE M. FRIEDMAN,
United States District Judge.

72 [File endorsement omitted]

In United States District Court

[Title omitted]

PETITION FOR APPEAL—Filed September 24, 1953

The Acting Solicitor General, on behalf of the defendants-appellants, prays that an appeal be allowed to the Supreme Court of the United States from the judgment of permanent injunction entered by this Court on July 31, 1953, and from each and every part thereof; that citation be issued in accordance with law; and that the material parts of the record, proceedings and papers upon which said judgment was based duly authenticated be sent to the Supreme Court of the United States in accordance with the rules of said Court in such cases made and provided.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

September 22, 1953.

73 [File endorsement omitted]

In United States District Court

[Title omitted]

ASSIGNMENT OF ERRORS—Filed September 24, 1953

The Acting Solicitor General, on behalf of the defendants-appellants, hereby files the following Assignment of Errors upon which he will rely in the prosecution of his appeal to the Supreme Court of the United States from the Judgment of Permanent Injunction of this Court entered on July 31, 1953.

The Court erred:

1. In holding that Section 405(b) of the Defense Production Act of 1950 does not authorize administrative imposition of the disallowance sanction provided by that Section.

2. In holding that prosecution of the administrative proceeding initiated by the Wage Stabilization Board before the National Enforcement Commission will cause irreparable damage to plaintiff-appellee.

3. In granting the judgment of permanent injunction restraining the defendants-appellants from prosecuting and hearing administrative proceeding No. 12-122 pending before the National Enforcement Commission or with respect to any alleged violations of the

BLEED THROUGH

BLURRED COPY

Defense Production Act of 1950, as originally enacted and as
74 amended, or of any regulations or orders issued pursuant thereto.

4. In issuing and entering its judgment of permanent injunction.

Wherefore, defendants-appellants pray that the judgment of permanent injunction of the District Court be reversed and set aside, and for such other relief as the Court may deem fit and proper.

ROBERT L. STERN,
Acting Solicitor General.

September 22, 1953.

75 [File endorsement omitted]

In United States District Court

[Title omitted]

ORDER ALLOWING APPEAL—September 24, 1953

The Acting Solicitor General, having made and filed his petition praying for an appeal to the Supreme Court of the United States from the judgment of permanent injunction of this Court in this cause entered on July 31, 1953, and from each and every part thereof, and having presented his assignment of errors and prayer for reversal and his statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that citation shall issue in accordance with law.

LOUIS E. GOODMAN,
Judge.

September 24th, 1953.

76-101 Citation in usual form showing service omitted in printing.

102-131 STATEMENT REQUIRED BY PARAGRAPH 2, RULE 12 OF THE RULES OF THE SUPREME COURT (omitted in printing)

132 In the United States District Court for the Northern District of California, Southern Division

PRAECIPE (omitted in printing)

133-134 Clerk's Certificate to foregoing transcript omitted in printing.

135 In the Supreme Court of the United States, October Term, 1953

No. 450

ARTHUR P. ALLEN, CHAIRMAN, TWELFTH REGION WAGE STABILIZATION BOARD; ET AL., DEFENDANTS-APPELLANTS

v.

GRAND CENTRAL AIRCRAFT CO., A CALIFORNIA CORPORATION, PLAINTIFF-APPELLEE

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF RECORD—Filed November 4, 1953

1. The Acting Solicitor General, on behalf of the appellants in the above-entitled proceeding, adopts as his statement of points to be relied upon the assignment of errors heretofore filed in connection with this appeal.

2. The Acting Solicitor General designates the entire record, as filed in the above-entitled proceeding, for printing by the Clerk of this Court.

ROBERT L. STERN,
Acting Solicitor General.

November 4, 1953.

136-137 [File endorsement omitted.]

137a In the Supreme Court of the United States, October Term, 1953

No. 450

ARTHUR P. ALLEN, CHAIRMAN TWELFTH REGION WAGE STABILIZATION BOARD, ET AL., APPELLANTS,

v.

GRAND CENTRAL AIRCRAFT CO., A CALIFORNIA CORPORATION, APPELLEE

STIPULATION AS TO PRINTING OF THE RECORD

It is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that the following

BLEED THROUGH

BLURRED COPY

parts of the record shall be printed by the Clerk of the Supreme Court:

The entire record and this stipulation except:

1. The transcript of the District Court proceedings of July 24, 1953, provided, however, that pages 1 through 67 shall be printed.

2. The exhibits attached to said District Court proceedings; provided, however, that Plaintiff's Exhibits B and F shall be printed.

It is further stipulated and agreed that any of the parties may refer in their briefs and argument to the entire record filed in the Supreme Court, including any part thereof which has not been printed.

ROBERT L. STERN,
Acting Solicitor General,
Counsel for Appellant.

PAUL R. WATKINS,
DANA LATHAM,
RICHARD W. LUND,
Counsel for Appellee.

January 22, 1954.

138 SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 450

ARTHUR P. ALLEN, CHAIRMAN, ETC., ET AL., APPELLANTS

vs.

GRAND CENTRAL AIRCRAFT COMPANY

ORDER NOTING PROBABLE JURISDICTION—January 4, 1954

Appeal from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

139 THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Before Hon. Clifton Mathews, Circuit Judge; Hon. Louis E. Goodman, District Judge; Hon. Monroe M. Friedman, District Judge

No. 32541

GRAND CENTRAL AIRCRAFT CO., A CALIFORNIA CORPORATION, PLAINTIFF

vs.

ARTHUR P. ALLEN, CHAIRMAN TWELFTH REGION WAGE STABILIZATION BOARD, ET AL., DEFENDANTS

Proceedings on Hearing of Complaint for Preliminary and Perpetual Injunction

REPORTER'S TRANSCRIPT

Friday, July 24, 1953

APPEARANCES

For Plaintiff: Latham & Watkins, by Richard W. Lund, Esq., and Littler, Lauritzen & Mendelson, by Robert Littler, Esq.

For Defendants: Lloyd H. Burke, Esq., United States Attorney, by Elmer Collett, Esq., Asst. U. S. Attorney, and Isaac Groner Esq., Wage Stabilization Board.

140 MORNING SESSION, FRIDAY, JULY 24, 1953, 10:00 A. M.

The CLERK: Grand Central Aircraft Company, a California corporation, plaintiff, versus Arthur P. Allen, Chairman Twelfth Region Wage Stabilization Board, et al., defendants, for trial.

Will respective counsel please state their names for the record?

Mr. LUND: Richard W. Lund of Latham and Watkins; Robert Littler of Littler, Lauritzen and Mendelson, for the plaintiff.

Mr. COLLETT: Elmer Collett, United States Attorney's office. Mr. Groner, who has appeared before the court on behalf of the Wage Stabilization Board, will present the matter as to the defense.

COLLOQUY BETWEEN COURT AND COUNSEL

Judge MATHEWS: Judge Friedman, you have a statement to make?

Judge FRIEDMAN: I want to inform counsel that depending upon the length of the trial and time it takes to decide this case, what I am about to state may have some bearing. My term of office will

BLEED THROUGH

BLURRED COPY

terminate with the adjournment of Congress and if this case is going to take some time there either should be some kind of a stipulation that the two judges remaining should decide the matter or something worked out to the satisfaction of counsel.

Has counsel any idea how long it will take to try this case?

141 Mr. LUND: I don't see that it should take beyond the day, Your Honor.

Mr. GRONER: It should not take beyond the day.

Judge FRIEDMAN: Would counsel be willing to stipulate, if I am unable to be here, that the two remaining judges shall determine the matter?

Mr. LUND: Your Honor, we would certainly be willing to stipulate. We are faced with the problem that in the event the two remaining judges were undecided we would not be able to get a decision. I suppose in that circumstance, it would just be necessary to get a third judge in. Except for that eventuality, which may be remote, your suggestion appears very practical. We would go along with it.

Mr. GRONER: We are willing to so stipulate.

Judge MATHEWS: You have in mind the possible objection that—no objection being made, as I understand; the possibility of disagreement is always present while you have an even number of judges hearing this matter. If counsel cared to enter into this stipulation, it might still be subject to approval by the remaining judges and we might ask the chief judge if that situation should arise, which I hope will not arise, we might deem it necessary to ask the chief judge to name another judge to sit with us to avoid the possibility of that which has been suggested.

142 As I understand, counsel on both sides are willing to enter into the stipulation if there is no objection?

Mr. LUND: No, Your Honor, providing there is provision for breaking a deadlock.

Mr. COLLETT: It has occurred in hearings before the Court of Appeals of occasion, one of the judges has not been present and the stipulation has been entered into that the judge who was not present may sit on the case and although he did not hear the argument, the reading of the briefs and such consultations that might occur between the judges, would be sufficient perhaps, if it were feasible to appoint another judge, that such further stipulation might cover that, that the briefs and transcript of the record before this court, instead of having heard it, that a reading of it would be sufficient to permit him to sit on the case.

Judge MATTHEWS: I take it that you are willing to have included as part of your stipulation that the two remaining judges might, in their discretion, request the appointment of a third judge to come into the case with them at whatever point the situation might arise?

I can't know and hope the situation doesn't arise at all, but I take it that counsel will be agreeable? I am not sure that we need ask to a stipulation on that. It will be understood.

Now, may I ask what, in the way of evidence, are counsel planning to introduce here today?

143 Mr. LUND: Yes, Your Honor. The answer and the complaint cover most of the field and the admissions to the answer leave only open, as we see it, for inquiry on the trial of question of fact, the actual question of irreparable injury. On the preliminary injunction we filed an affidavit on that point and we would want to present today the direct testimony supporting the statements and that affidavit.

Judge MATHEWS: For instance, in your complaint, beginning with paragraph 2, second sentence of paragraph 2 is denied in the answer. That is the sentence that says plaintiff's plants at Tucson and Glendale have been and are now engaged in the production, modification and overhaul of aircraft equipment under contracts entered into prior to the enactment of the Defense Production Act of 1950. That allegation is denied and then in the various other parts of denials of different paragraphs on the original complaint, part would be denied and a part admitted.

Then there is an amendment to the complaint which contains several pages and there is a supplemental complaint and the stipulation with regard to filing the amendment and the supplemental complaint says that all these allegations are deemed denied. Some of those are factual allegations?

Mr. LUND: That is correct, Your Honor. The factual allegations in that amendment to the complaint cover the issue of irreparable damage which is denied and which we are prepared to pre-

144 sent proof on.

Judge MATHEWS: How long is it going to take to present this testimony?

Mr. LUND: We have a number of—probably depending upon the ease with which we can present the evidence. I anticipate, if we do not run into too many objections, we can possibly conclude by noon.

Judge MATHEWS: I had in mind, if it is a long, drawn out taking of testimony, that we might follow the procedure which is often followed in these Three Judge Cases, as you probably know.

Mr. LUND: No, Your Honor, this is my first experience.

Judge MATHEWS: When a Three Judge Court is confronted with the taking of a large amount of testimony, it is quite common practice for that court to name one of the judges as a master and the other two judges' time could be devoted to something else until the testimony is all in and then with the testimony before it, the three judges can reassemble, hear the testimony and argument. That is

BLEED THROUGH

BLURRED COPY

a time-saving method adopted in a good many cases. I have been in some cases where the testimony was short, only taking a short time and the court heard the testimony. Apparently you have that in mind today.

Mr. LUND: We think we can conclude today.

Judge MATHEWS: You may proceed.

Mr. LUND: Your Honor, at the outset, I believe counsel
145 for the defendants and ourselves would like to present a stipulation. I don't think it is required under the law, but I believe the court would take judicial notice of the orders of the Economic Stabilization Administrator, the enforcement commissioner and so on, but we provide, out of an abundance of caution, that the parties will stipulate that the court may take judicial notice of various orders of the Economic Stabilization agency and subagencies. I have available for the convenience of the court three copies of the various orders and regulations, photostated from the Federal Register, which are pertinent. They are not all pertinent regulations, but certainly some of the most important ones, and Mr. Groner may have some others he has to present to the court for their convenience.

I would think these would not be put in evidence as exhibits under our stipulation. We can do whichever way court or counsel cares.

Judge MATHEWS: I think you might do it either way with the stipulation, although perhaps it is unnecessary. We may take judicial notice. It probably isn't necessary to offer them as exhibits, but would do no injury that I could see.

Mr. LUND: I want to get into the record what the documents are. We will have additional copies so each member will have them.

May we have that stipulation, Mr. Groner, that the court will
146 take judicial notice of the various orders and regulations?

Judge MATHEWS: I hope that what you do will leave us in such a position we don't have to search through the Federal Register.

Mr. LUND: That was what we are trying to avoid—have it all before you.

I just want to enter into a general stipulation that the court may take judicial notice.

Mr. GRONER: Yes.

OFFERS IN EVIDENCE

The CLERK: Plaintiff's Exhibit A for identification only.

(Whereupon copies of orders referred to above were marked Plaintiff's Exhibit A for identification only.)

Mr. LUND: They are all the same; three copies of the same. If I may have that, I will identify it in the record.

Plaintiff's Exhibit A, Your Honor, is a photostat from the Federal Register of various regulations. I will just call them off. General

Wage Stabilization Regulation No. 1; General Order No. 15; General Order No. 15, Amendment 1; General Order No. 18, Amendment 1; General Order No. 18 and General Order No. 16, General Order No. 19, General Procedural Regulation 1, Revised; General Procedural Regulation 1, Revised, Amendment 1 and Executive Order 10434.

We offer those in evidence, Your Honor.

Judge MATHEWS: No objection?

Mr. COLLETT: No objection.

147 Judge MATHEWS: They are received.

The CLERK: Plaintiff's Exhibit A in evidence.

(Whereupon Plaintiff's Exhibit A, heretofore marked for identification only, admitted into evidence.)

Mr. LUND: May this be marked B for identification?

The CLERK: Plaintiff's Exhibit B for identification only.

Mr. LUND: At this point, Your Honor, I believe we might stipulate that Plaintiff's Exhibit B is a document presented to us as counsel for the plaintiff herein and to the enforcement commissioner in the pending administrative case which was admitted by the pleadings, presented by the Regional Counsel of the Wage Stabilization Board, as the computation made by Regional Counsel of the Wage Stabilization Board of the amounts of the alleged violations of stabilization involved, not pending in the administrative enforcement case.

Will you so stipulate, Mr. Groner?

Mr. GRONER: As I understand, we are stipulating just as to what the document is, not of course as to its relevancy or any other characteristic of it?

Mr. LUND: That is correct; the presentation by your office, your claims as to what the alleged violations amounted to.

May that document be received in evidence, Your Honor?

Judge MATHEWS: Is there any objection to its being re-

148 ceived in evidence?

Mr. GRONER: I do not see its relevancy to this proceeding, Your Honor. I would like, at the outset, to state a general objection which I am going to raise. I don't know at what point I ought to raise it. I'd like the courts' guidance. It seems to us—it seems to the defendants that the primary issue now is essentially a legal one as far as we are concerned. Our position is that if we have legal authority to proceed with this hearing, that is to say, if there is no constitutional bar and there is no bar in the statute, then we have full legal authority to go ahead and whatever——

Judge MATHEWS: Are you making any objection to this document that has been offered in evidence?

BLEED THROUGH

BLURRED COPY

Mr. Groner: Yes, and I therefore would object to this document as irrelevant to the primary purpose at hand, namely, that whatever the figures are with respect to the alleged violations, they are of no significance to this proceeding.

Judge GOODMAN: May they not have something to do with the issue of damage?

Mr. GRONER: As we see the case, Your Honors, whatever—if by "damage"—I don't know what you mean by damage.

Judge GOODMAN: I mean on the issue of irreparable damage, that the amount involved has some pertinency to the allegation as to irreparable damage. If 25 cents was involved, we'd be wast-
149 ing our time. If the amount involved was such that it would have some relationship to the claim of irreparable damage, then it might be pertinent.

Mr. GRONER: I believe, Your Honors, the entire claim of irreparable damage is irrelevant and I proceed to object to that line of questioning. A preliminary injunction has been granted and is outstanding. The preliminary injunction was granted in part because there was irreparable damage, but I would assume fundamentally, because of the grave and serious issues of law, I would assume that this trial is the appropriate forum for the resolution of that issue.

Our position furthermore is that if we have the constitutional and statutory authority to proceed, then the amount of money involved, whether it is 35 cents or thirty-five million is irrelevant, because Congress has authorized us to go ahead.

Judge GOODMAN: Isn't that wrapped up in the main question that we decided? It is rather a technical question, isn't it? We could reserve ruling on the admission of this document, but we might as well have the whole record before us.

Judge MATHEWS: I would think you might perhaps make a general objection that you wouldn't have to repeat any more. Then, whenever you thought proper, you could simply say "Objected to on the same grounds," because we don't have a jury here and
150 it isn't very important whether we admit or reject a piece of irrelevant testimony, some testimony which turns out to be irrelevant. When you are trying a case to the court, whether it be one judge or three, it isn't terribly important if the court receives some irrelevant testimony, something that turns out to be immaterial and so you aren't particularly hurt. It is very well to make objections if for no other reason than to save the time of the court and counsel. Unless a piece of testimony or exhibit is obviously inadmissible, it would probably save time for us to admit always subject to your objection. If it turns out, in our opinion, to be irrelevant and immaterial, we won't consider it; otherwise we will and so it seems to me we don't really need to hear more than just the objection. I am pointing out we wouldn't need to have all these

objections argued, that you need not greatly be concerned about the admission of testimony, that you perhaps wouldn't want a jury to see at all if this were a jury case. This isn't a jury case, so we might shorten the case a great deal by having the objections stated briefly and not make an argument on the objection.

Mr. GRONER: I wasn't attempting to make an argument, Your Honors, I was just trying to state my objection.

I have one other objection to this document.

Judge MATHEWS: You have an objection to it on the grounds of irrelevancy and immateriality?

151 Mr. GRONER: May I take a sentence or two in addition? Namely, it does not go to the damage, Your Honors. It is irrelevant. It merely indicates the view as to one of the facts which the prosecution may take in this hearing. It doesn't even indicate the position it will take. It certainly has no value whatsoever to indicate what the outcome of the hearing may be, because no——

Mr. LUND: Will counsel enter into a stipulation concerning the exhibit? I wanted to avoid taking the stand to identify the documents.

Judge MATHEWS: It is admitted.

The CLERK: Plaintiff's Exhibit B in evidence.

(Whereupon Computation by Regional Counsel of the Wage Stabilization Board was marked Plaintiff's Exhibit B and admitted into evidence.)

Mr. LUND: I would also present, Mr. Groner, that we stipulate at this time, if this matter goes to a hearing before the enforcement commissioner that the estimated time of trial before the enforcement commissioner is two and a half to three weeks. Will you so stipulate?

Mr. GRONER: We will so stipulate.

Judge MATHEWS: Very well.

Mr. LUND: I will call Mr. Denny.

152 ROBERT O. DENNY called as a witness on behalf of the plaintiff, sworn.

The CLERK: Will you please state your name, address and occupation to the court?

The WITNESS: Robert O. Denny, 10690 Somma Way, Los Angeles, California.

DIRECT EXAMINATION.

Mr. LUND:

Q. What is your business address, Mr. Denny?

A. 1310 Airway, Glendale, California.

BLEED THROUGH

BLURRED COPY

Q. With what company are you employed?
A. Grand Central Aircraft Company.
Q. And your position with Grand Central Aircraft Company?
A. President.
Q. How long have you held that position?
A. Since 1950.

Mr. LUND: As a matter of guidance, Your Honors, we have a number of original exhibits to produce and we would want to, in each case, with the court and counsel's permission, substitute authenticated copies. It might be simpler if we merely identify the authenticated copy and show the original to Mr. Groner instead of identifying the original and substitute a copy, if that is agreeable to everybody.

Mr. COLLETT: If the Court please, in the interest of, I think, a good deal of time, counsel has a large number of documents which has not been disclosed. We have to sit here and try to look
153 at them. It might be wise to get them together and pass them over so we can take a look at them.

Judge MATHEWS: Still wiser, all this should have been done before we met here this morning.

Mr. LUND: Yes, Your Honor. We did not have a pre-hearing conference or trial in this case, which would have simplified and made all these exhibits stipulated to. When the matter was set for trial, there was no provision made for that.

This matter was controlled from Washington. If we ask the local attorney to stipulate, he would have to confer with Washington and that takes considerable time. It didn't appear to be very practical to try to work it out. I might suggest if we had a 15 minute recess, counsel might stipulate to a lot of them to avoid the Court's and the clerk's and everyone's time.

Judge GOODMAN: How many documents?

Mr. LUND: Depending upon how many we can stipulate to; probably eight or ten. We have a series of our defense contracts. Perhaps we can cover them by general testimony or by stipulation. If not, of course, we have many more than eight or ten documents.

Judge GOODMAN: I would suggest you examine the witness and have him identify a document and then just have it marked for identification temporarily and then during the recess period,
154 get your stipulation from counsel.

Mr. LUND: Do I understand the Court prefers to identify the documents through the witness before even having it marked for identification?

Judge GOODMAN: You can mark it for identification. You will have to do that. As far as its admission is concerned, you can refer to it until counsel looks at it.

The CLERK: Plaintiff's Exhibit C for identification only.

(Whereupon copy of credit agreement was marked Plaintiff's Exhibit C for identification only.)

155 Mr. LUND:

Q. Mr. Denny, I show you a document headed "Grand Central Aircraft Company, credit agreement, August 24th, 1951," identified as Plaintiff's Exhibit C, and will you tell us please what that document is, just briefly?

A. This is the document that shows the credit agreement between Grand Central Aircraft Company and three participating banks and loans which we have obtained to help finance our company; working capital and so on.

Q. This agreement was entered into, on or about that date, August 24th, 1951?

A. That is correct.

Q. This copy is authenticated the same as the original with the signatures and all the original entries?

A. That's correct.

The CLERK: Plaintiff's Exhibit D for identification only.

(Whereupon document was marked as Plaintiff's Exhibit D for Identification.)

Mr. LUND:

Q. I show you Plaintiff's Exhibit D, a document headed "Eighth Amendment, Grand Central Aircraft Company, Credit Agreement, dated August 24th, 1951", and ask you just briefly to identify that document.

A. This embodies a series of eight amendments which have been made to the original credit agreement and it is, by signatures which I can recognize, a copy of the original.

156 Q. Plaintiff's Exhibit C is the original credit agreement, amended from time to time through a series of seven amendments, is that correct?

A. That is correct.

Q. Then you came up to the Eighth Amendment, the document you identified, did that incorporate all the prior amendments?

A. That is right.

Q. Then plaintiff's Exhibit D then brings the applications for credit up to date, is that correct?

A. That's correct.

Q. Mr. Denny, will you tell us—describe briefly for us the work performed by Grand Central Aircraft Company; the nature of the work?

A. The primary work we performed is overhaul and modification of aircraft and aircraft engines.

BLEED THROUGH

BLURRED COPY

Q. How long has the company been in business?

A. Since 1929.

Q. At what location?

A. Well, at Glendale, California, i 1929, which the general offices are still in Glendale at the same location.

Q. What development or expansion took place about 1950?

A. We opened a new plant in Tucson, Arizona, on June—the latter part of June, 1950.

Q. Prior to that time, approximately how many employees did you have in your Glendale plant?

157 A. Normally, it varies—normally averaged about three to four hundred.

Q. And at the Tucson plant after it opened, how large did it grow?

A. It finally got to approximately 4500 employees.

Q. What type of aircraft has your company been working on, both in Glendale and at Tucson?

A. C-47's, F-51's, B-29's, Boeing B-47's.

Q. This is all under contract for the Air Force?

A. Those particular planes that I mentioned were all contracted from the United States Air Force.

Q. Has the work of the company in the last three years been limited to Air Force work?

A. By and large most of the work for the Air Force. However, we have done and still are doing some work for commercial customers such as the airlines and private owners.

Q. The work for the Air Force involves, as I understood your testimony, mainly modification of various aircraft?

A. That is correct, modification, reconditioning, overhauling.

Q. Are you presently operating under Air Force contracts?

A. Yes, sir.

Q. Do you have any non-Air Force contracts?

A. Yes, sir.

Q. Will you tell us in a general way what percentage or

158 proportion of your business now is with the Air Force?

A. I suspect about 75 per cent of our work is Air Force work.

Mr. Lund: At this point, Your Honors, we do have the various Air Force contracts and I for one feel it should not be necessary to get into the contracts themselves. I don't know that Mr. Groner's office is going to dispute the facts that we are operating on these defense contracts and have been for some time. Perhaps you don't propose to question that aspect even though it was denied in the answer that the company has been engaged in this Air Force work. Then I won't need to go into the voluminous details of the agreements.

Mr. GRONER: I'm not sure—do you mean——

Mr. LUND: In your answer you denied we were doing repairing and overhauling, and modification work for the United States Government, ever since 1950 and so on.

Mr. GRONER: I think what we said was we lacked the information to know whether that was so or not. I don't want to make a big issue out of it. I am perfectly willing to stipulate that that's the general field that they are in, if that would be sufficient.

Mr. LUND: All right.

Mr. LUND:

Q. Mr. Denny, as of September of 1950, you were operating, I take it, under Air Force contracts which were made prior
159 thereto?

A. That's correct.

Q. Do you recall whether or not any of those pre-September 1950 Air Force contracts are still in effect?

A. I don't know.

Q. Under your contracts with the Air Force, for the most part, is there a specified schedule of production to be performed by your firm?

A. Yes, sir.

Mr. LUND: I believe, Your Honors, I would like to introduce at least one of our Air Force contracts as a sample.

Judge MATHEWS: Any objection?

Mr. GRONER: No objection.

Judge MATHEWS: Admitted.

The CLERK: Plaintiff's Exhibit E in evidence.

(Whereupon Air Force contract was admitted in evidence and marked as Plaintiff's Exhibit E.)

Mr. LUND:

Q. Mr. Denny, I show you plaintiff's Exhibit E, a document headed "Defense Negotiations, Contract," numbers which are long, ending "26619" and ask you if that is a typical Air Force contract about which you have been testifying that your company has entered into in the last few years?

A. Yes, sir.

160 Q. In the event the production schedule prescribed in such a contract is not met by your Company on time and assuming the delay is not caused by failure on the Government's part to furnish you the planes or whatever their commitments are, what position does that put your company in under such a contract?

A. We'd be in the position of possible default of performance on

BLEED THROUGH

BLURRED COPY

our part and the Government, of course, could very well terminate the contract and cancel it out.

Q. And if that were done, if the contract was cancelled out for some such default on your part, what would be your obligation with reference to the working process and so on?

A. Well, the Government might very well take the position that it was no fault of theirs, we were unable to perform probably, and therefore any additional costs which the Government would be forced to pay the company, very probably they would bill us and make us pay the necessary costs of moving the working process and inventories and so on into another contractor's plant.

Q. What, if you can give us some reasonable estimate, would be the actual cost of moving from your Tucson plant, the unfinished Government work you have there, assuming that the contracts are cancelled and the planes are to be moved from that plant to some other location, say the Boeing Plant. What is the approxi-
161 mate cost of just making that move of the unfinished planes?

A. If it were terminated because of the contract default, no fault on the part of the Government, I would suspect it would be a minimum of $4,000,000, the cost of moving those partially completed airplanes that could not fly, moving them out.

Mr. LUND: May I have this marked for Identification?

The CLERK: Plaintiff's Exhibit F for Identification only.

(Whereupon document was marked as Plaintiff's Exhibit F for Identification only.)

Mr. LUND: May I have that marked "G" too? I think I'll interrogate him about that first.

The CLERK: Plaintiff's Exhibit G for Identification only.

(Whereupon document was marked as Plaintiff's Exhibit G for Identification only)

Mr. LUND: Mr. Denny, under your credit agreement with the banks, you are required to make regular financial reports to the banks or to the Farmers and Merchants, as agents for these three banks?

A. Yes, sir.

Q. I show you Plaintiff's Exhibit G and ask you if this is not the most recent financial statement prepared by your company to the banks and for the banks in connection with that credit
162 agreement?

A. Yes, sir, that is the latest financial report.

Q. Other than the various supporting documents and exhibits?

A. Yes.

Q. Now, at our request, did you have prepared a schedule show-

ing the available cash in your organization between June 21st and July 19th, 1953?

A. Yes, sir.

Q. I show you Plaintiff's Exhibit F for Identification and ask you if that is the schedule prepared by your Treasurer?

A. Yes, sir, that is the schedule.

Q. That schedule does show from week to week over that period the amount of cash your organization had on hand?

A. Yes.

Mr. LUND: We offer the documents in evidence, Your Honors.

Judge MATHEWS: Admitted.

The CLERK: Plaintiff's Exhibits F and G in evidence.

(Whereupon Plaintiff's Exhibits F and G, formerly marked for identification only, were admitted in evidence and marked Plaintiff's Exhibits F and G in evidence, respectively.)

Mr. LUND:

Q. Will you explain briefly the procedures involved in the company obtaining loans under this credit agreement?

A. Well, there is an account called "Grand Central Aircraft
163 Company collateral account" and we can borrow money from the banks on a note and would have hypotheticated various Government contracts and the checks as they come in from the Government, go to the bank and are placed in this collateral account. We can then draw money of the collateral account, if sufficient funds are in this particular account, or we can get additional funds by signing a new note and we do this on a weekly basis. Each week we notify the bank how much money we will need to operate and we get as much as we can out of this collateral account, which is money coming in from the Government on previously rendered invoices, and if that fund is not ample, then we sign a new note and increase the amount of the borrowing.

Q. Under the original credit agreement that sets up the specification of the maximum amount the banks will make available for your weekly borrowings? Is that correct? Under the original credit agreement, you don't borrow four and a half million dollars, whatever specified, they make that credit available to you?

A. Yes, under the original credit agreement we have a line of credit of $6,000,000. We withdrew or used that amount credit as necessary. No, we do not take the entire $6,000,000 at one time; merely draw against it as we needed it.

Q. That is true at the present time; you draw each week
164 against the credit that you have with the banks under that agreement, is that correct?

BLEED THROUGH

BLURRED COPY

A. That is correct.

Q. And this schedule that you have just introduced, Plaintiff's Exhibit F, that indicates, does it not, the amounts borrowed from the bank, each of these weekly periods and that is the credit agreement you have been testifying about, is that correct?

A. That is correct.

Q. What other source of working capital, if any, does Grand Central Aircraft Company have for its operation other than the weekly bank loans?

A. That is the only source available to our knowledge.

Q. As I understand, the Air Force contracts at least, the rights to receive payments under the Air Force contracts, are assigned to the bank as collateral in support of their credits they have advanced to you?

A. Yes, sir.

Q. And the payments are made right by the Government to the banks?

A. Yes, sir.

Q. And deposited in this collateral account?

A. Yes, sir.

Q. What was the balance in that collateral account with the banks as of yesterday?

165 A. Approximately $70,000.

Q. What would happen, Major Denny, if tomorrow you applied or today your company applied for regular weekly advances from the banks and it was refused? What would that do to your operation?

A. Well, according to our contract schedule, I believe we have approximately $580,000 cash on hand as of today. If we were told we couldn't borrow additional funds through the credit agreement with the banks, we then would be unable to continue to operate for lack of working capital, which means that we would automatically have to terminate all of our employees. As of today we owe them two weeks' payroll, which is approximately a quarter of a million dollars a week. That means we would owe our employees half a million dollars as of today. If we terminated it would take practically all the cash we have to pay the employees upon their termination. We would then have to notify the Government that we were unable to continue and default on all of our contracts.

Q. I notice that credit agreement as amended by the terms, expires on September 30th, 1953. Your company will make efforts to have that agreement further extended?

A. Yes, sir.

Q. That September 30th, 1953 date is in itself an extended date, is it not? The original term did not run that far?

A. Yes, sir.

166 Q. What would happen, Major Denny, if the banks refused to extend this credit agreement? What effect would that have on your operation?

A. Well, for lack of working capital, we would be unable to continue performance under our various Government contracts and would have to cease and notify the Government that we're in default.

Q. Major Denny, I direct your attention to Plaintiff's Exhibit G, a financial statement that you have identified and the reference in this series of schedules to the earnings of the company during the first few months of 1953, net profit for the period, and ask you if that is based upon the cost determination—pardon me.

I ask you if that figure is based upon the existing situation so far as the reimbursement by the Government is concerned under your contracts, and if it fails to take into account possible disallowance by the Government of reimbursement of items under your present Air Force contracts?

A. Yes, the Government figure that is shown in this particular schedule is what we believe to be realistic and based on the fact that we believe that we will obtain reimbursement for all our costs that go into making up this figure.

Q. But it is possible on the basis of your experience that the Government would not reimburse you to cover all these
167 amounts?

A. That is very possible.

Q. That is on an accrual basis; it is not based on the actual cash received from the Government?

A. That is correct, and it is quite possible this figure would be lowered somewhat.

Q. For the period of 1951, did the Government reimburse your company for all of the expenses that you made claim for reimbursement on?

A. No, sir.

Q. What is the figure that the expenses actually paid by the company, for which the Government refused to make reimbursement?

A. $548,000.

Mr. LUND: Do you want to make these please?

The CLERK: Plaintiff's Exhibit H for Identification only.

Mr. LUND: Your Honors, and Mr. Groner, Plaintiff's Exhibit H for Identification is the company's original and only copy of its 1951 corporate income tax return. I'd like to enter into a stipulation if we may, we may have a photostat made of this document and substitute it in lieu of the original and withdraw the original, if that is satisfactory to the Court and counsel.

Mr. GRONER: No objection.

BLEED THROUGH

BLURRED COPY

168 (Whereupon 1951 income tax return was marked as Plaintiff's Exhibit H for Idenitfication only.)

Mr. LUND:

Q. I show you United States Corporate Income Tax Return Form 1120 for the year 1951, bearing the Grand Central Aircraft Company, and identified as Plaintiff's Exhibit H for Identification and ask you if that is not your company's own copy of its 1951 corporate federal Income tax return.

A. Yes, sir.

Mr. LUND: We offer it in evidence, Your Honors.

Judge MATHEWS: Admitted.

The CLERK: Plaintiff's Exhibit H, now in evidence.

(Whereupon Plaintiff's Exhibit H, previously marked for identification only, received in evidence and marked Plaintiff's Exhibit H.)

The CLERK: Plaintiff's Exhibit I for Identification only.

(Whereupon document was marked Plaintiff's Exhibit I for Identification.)

Mr. LUND: Mr. Denny, at our request, did you have the Treasurer of your company recompute your 1951 Federal income tax on the basis of the disallowance by the Air Force of this $548,000 figure on reimbursement?

A. Yes, sir.

169 Q. I show you Plaintiff's Exhibit I and ask you if that is the recomputation of your 1951 income tax, after disallowance by the Government of that $548,000?

A. Yes.

Q. And based thereon, the net income of the company before taxes would be $75,000, is that correct, for the year 1951?

A. Yes, sir.

Mr. LUND: We offer it in evidence.

Judge MATHEWS: Admitted.

The CLERK: Plaintiff's Exhibit I in evidence.

(Whereupon Plaintiff's Exhibit I previously marked for Identification only, was admitted as Plaintiff's Exhibit I in evidence.)

The CLERK: Plaintiff's Exhibit J for identification only.

(Whereupon document was marked as Plaintiff's Exhibit J for Identification only.)

Mr. LUND:

Q. Now, at our request, Mr. Denny, did you have your Treasurer compute what your 1951 income tax liability would be if the $548,000 Air Force disallowance were taken into account and if there was taken into account the $5,000,000, plus disallowance for wage stabilization alleged violations?

A. Yes, sir.

Q. I show you plaintiff's exhibit J and ask you if that is the computation you made, taking into account the claim of
170 the Wage Stabilization violation, involving the disallowance, potential disallowance of some $5,000,000 and the Air Force $500,000——

Mr. GRONER: I want to object to these hypothetical and remote —we object to that amount and raise that objection to practically all of these questions, just so we have it on the record.

Judge MATHEWS: You may answer.

The WITNESS: Yes, sir.

Mr. LUND: We offer it as Plaintiff's Exhibit J in evidence.

Judge MATHEWS: Admitted.

Judge GOODMAN: I am not sure about that $548,000.

Mr. LUND: Thank you, Your Honor.

Mr. LUND:

Q. I take it the Air Force audits your claimed expenses for which you seek reimbursement, from time to time?

A. Yes, sir.

Q. It is rather a complete and full audit?

A. Yes.

Q. Will you explain just briefly what that $548,000 item constitutes?

A. The $548,000, sir, is money that the company has actually spent in operating its business, but the Air Force audit people take
the position that the money was spent for things of which
171 they have no responsibility of liability and therefore, they will not reimburse. Even though we have paid the money out, they in turn take the position that they are not going to reimburse us and it was disallowed.

Judge GOODMAN: Your 1951 income tax return was filed then before this $548,000 was disallowed, is that it?

Mr. LUND: That is correct

Judge GOODMAN: The 1951 return was filed on an accrual basis rather than a cash basis?

Mr. LUND: That is correct, it so shows.

BLEED THROUGH

BLURRED COPY

Mr. LUND:

Q. Actually the $548,000 figure is not final yet? Is not that still under consideration?

The WITNESS: Yes, sir, it is still under consideration. As a matter of fact, it started out at about $1,000,000, it is now down to about $548,000 and we are discussing with the Air Force a reduction on that.

Q. How much of $548,000 is still in dispute?
A. Approximately $100,000.
Q. You are still seeking to get reimbursement on that $100,000?
A. That is correct.

Mr. GRONER: This disallowance has nothing to do with the proposed disallowances at bar. I want the record to show that any references, in our judgment, is beside the point and offers no addition to the evidence in the case. I don't want to keep objecting,
172 but the questions are becoming, it seems to me, more and more remote from the subject matter at hand.

Judge MATHEWS: You won't be hurt. The only harm will be, we have wasted that much time.

Mr. LUND:

Q. Give us the type of expenses the company has incurred which the Government has refused to reimburse you?

A. I think one good illustration would be the legal fees, for example, in this particular Wage Stablization Board situation that they have disallowed.

The CLERK: Plaintiff's Exhibit J in evidence.

(Computation sheet previously marked as Plaintiff's Exhibit J for Identification, was thereupon admitted in evidence and marked Plaintiff's Exhibit J.)

Mr. LUND: Could you give us another illustration?

A. Certain types of advertising costs were disallowed.
173 Q. Were the travel expenses disallowed?
A. Yes, travel expenses. Traveling, for example, in connection with this particular case would be disallowed—have been disallowed.

Mr. LUND: We offer, Your Honors, Plaintiff's Exhibits C and D in evidence. We just identified those previously. That is the credit agreement and the extension.

That is all, Your Honors, with this witness.

I beg your pardon. I didn't ask for a ruling on the admission of Exhibits C and D.

Judge MATHEWS: C and D have been offered in evidence?

Mr. LUND: Yes, Your Honor.

Judge MATHEWS: They may be admitted.

The CLERK: Plaintiff's Exhibits C and D in evidence.

(Whereupon Plaintiff's Exhibits C and D, heretofore marked for identification only, admitted into evidence.)

Mr. LUND: We are through, Mr. Groner.

Mr. GRONER: We don't have very many questions. I wonder if we could reserve the right after we have studied these documents to recall this witness? I do want to reserve that right.

Judge MATHEWS: Do you have other testimony you wish to proceed with?

Mr. LUND: We have another witness, Your Honor.

Mr. GRONER: I just have one question to ask. I would like
174 to reserve the right to ask further questions if it should be necessary later of this witness.

Judge MATHEWS: No objection to that.

CROSS-EXAMINATION.

Mr. GRONER:

Q. What is—I guess this is Exhibit D. This is your most recent extension of your loan? I wondered when that was and what the dates of the previous extensions were. Maybe I don't understand what this document is. I have something here called Eighth Amendment. I take it—I may be wrong—that one of the amendments extends until September, 1953, is that correct?

A. I'd almost have to look at the document to refresh my memory.

Q. Let me get at this way: The original credit agreement of August 24th, 1951, what was the terminal date on that?

A. It was sometime prior to April 30th—I mean, September 30th, 1953. I don't remember exactly what was the termination.

Q. Was it in 1951, 1952 or 1953? Do you recall it even that well?

A. I think it ran for approximately a year.

Q. Roughly in August of 1952 and then there is an additional extension presumably for—how long was that?

A. I don't recall.

Q. There has been an extension of this loan since the time
175 when the Wage Stabilization Board brought the complaint in the administrative proceedings, has there not?

A. I believe so.

Q. And has there been more than one?

A. Not to my knowledge.

Q. Has there been more than one extension since the time that the investigations were held in your plant by our agency?

BLEED THROUGH

BLURRED COPY

A. I don't believe so.

Q. One other question. Have you ever officially notified the bank or any of the banks involved of dependency of the Wage Stabilization enforcement proceeding of this lawsuit?

A. Yes.

Q. You did that promptly? When did you do that? Could you indicate and how did you do it and what was their reaction? When did you do it?

A. I don't know.

Q. Was it relatively promptly after we filed our complaint? Was it before then or after that? That was November, 1952. Was it before that or after that?

A. Well, I don't know quite what you mean by formerly notified.

Q. If that is unclear, have they known—in your judgment, have they known of this Wage Stabilization Board proceeding fully and completely? Have they been fully advised by you since the
176 beginning of this administrative enforcement proceeding?

A. Yes, sir.

Mr. GRONER: I think that's all.

Judge MATHEWS: You may wish to cross-examine further at a later time?

Mr. GRONER: Yes, sir.

Mr. LUND: That is all of this witness. In the light of these questions, I would like to proceed again to avoid getting to the stand myself as a witness. I would like to stipulate that the document, Plaintiff's Exhibit 1, which is the computation, payroll and so on was presented on January 28, 1953, to ourselves as counsel for the plaintiff and that was the first time the Regional Counsel of the Wage Stabilization Board presented any such computation of the——

Mr. GRONER: I don't know to what you are referring. That date of November, I used as the date of the complaint.

Mr. LUND: Which doesn't specify the amounts involved. My point is, we were given the first official statement of the statement of the amounts involved at the time Plaintiff's Exhibit B was presented to us and that date was January 28, 1953. Will you stipulate that the date we received Plaintiff's Exhibit B was January 28, 1953?

Mr. GRONER: Yes, we will stipulate.

May I ask an additional question?

Mr. GRONER:

177 Q. Has there been an extension of the loan since January 28, 1953?

A. I think the extension date was prior to that. I'm not sure.

Q. Did the bank or banks—I haven't studied the documents. Were they fully aware or are they now fully aware of the amounts

involved to the extent that you believe they are the amounts involved? Of course, I haven't conceded they are. Are they aware of the implication you put on the document to which your counsel has just referred?

A. Yes, sir.

Mr. GRONER: One moment, please.

I wonder if the witness could refresh his recollection or in some other way have before the Court the dates of when the loans were extended so that we may have that? I don't think it is in this document.

Judge GOODMAN: Why don't you ask counsel to stipulate to that; give you the figures on it.

Mr. GRONER: It has been brought to my attention that the first paragraph, each of the amendments recites a date of extension—I have no other questions.

Mr. LUND: That is all, Your Honor.

Judge MATHEWS: Your next witness.

OSCAR T. LAWLER, called as a witness on behalf of the plaintiff, sworn.

178 The CLERK: Will you please state your name, address and occupation to the Court?

The WITNESSS Oscar T. Lawler, 216 South Plymouth Boulevard, Los Angeles. I am executive vice-president of the Farmer's & Merchant's National Bank of Los Angeles. That would also be my business address, of course.

DIRECT EXAMINATION.

Mr. LUND:

Q. You are a member of the Board of Directors of the same bank, Mr. Lawler?

A. I am.

Q. Member of this loan committee?

A. Yes.

Q. Your duties and responsibilities as executive vice-president involve the recommendations to your Board of Directors of potential loans or extensions of credit?

A. Yes, sir.

Q. And you do from time to time make an investigation and then make recommendations to your Board as to whether or not they should grant credit?

A. That is generally correct, yes.

Q. Those recommendations of yours are usually and normally followed by the Board of Directors?

A. Generally speaking, yes.

BLEED THROUGH

BLURRED COPY

Q. You are familiar with the credit agreement between the Grand Central Aircraft Company and your bank?

179 A. I am.

Q. And are you, in general, familiar with the financial condition of the Grand Central Aircraft Company?

A. May I add to the first question? The credit agreement between Grand Central Aircraft Company, my bank and two other outstanding financial institutions, namely the California Bank and the Security First National Bank of Los Angeles.

Q. Thank you for calling that to my attention.

In this case the credit agreement and loans are made by the three banks, as I understand; your bank, however, does act as agent for the three banks, including yourself, in the mechanics of handling this loan, is that correct?

A. That's correct.

Q. I don't know that I got an answer to my question about whether you were also familiar with the financial condition of the Grand Central Aircraft Company?

A. Yes, sir.

Q. You, at our request, I believe, familiarized yourself somewhat with the procedures involved before the National Enforcement Commission and the potential penalties involved in such a proceeding.

A. I read over the general order.

Q. 15?

A. General Order 15.

Q. Procedural regulations?

180 A. Procedural regulations, yes, sir.

Q. Mr. Lawler, if an enforcement commissioner of the National Enforcement Commission in a proceeding involving the Grant Central Aircraft Company should make findings and determinations that wages in the amount of $5,000,000 or more should be disallowed for income tax and or an alternatively contract reimbursement purposes for the year 1951, what would be your recommendation to the Board of Directors of your bank with reference to the requests from Grand Central Aircraft Company to extend the present credit agreement beyond September 30, 1953?

Mr. GRONER: I renew my objection to these questions on the grounds they are hypothetical.

Judge MATHEWS: Your objection is to the grounds they are hypothetical and that the information asked for is irrelevant and immaterial?

Mr. GRONER: Yes, particularly this question, that it is hypothetical.

Judge MATHEWS: We will consider the objection has been made and repeated and the testimony will be received subject to the objection.

The WITNESS: Would you mind then giving me that question again, sir?

Mr. LUND: Will you read the question, Mr. Reporter.

(Question read by the reporter.)

181 The WITNESS: Under those circumstances, sir, I would give a negative recommendation to my Board of Directors with respect to the further extension of cerdit.

Mr. LUND:

Q. By saying "negative" you mean you would recommend that the bank not extend the credit agreement, is that correct?

A. That is correct.

Q. Would that also be true if the enforcement commissioner's findings and determinations was that the amount of such disallowance should be $3,000,000?

A. In my opinion, the recommendation should continue to be negative under those circumstances based on the financial condition of the company as I know it at this time.

Q. And would the same be true if the findings and determinations of the enforcement commissioner was for a disallowance of a million dollars?

A. Yes.

Q. Three-quarters of a million dollars?

A. Yes, sir.

Q. I take it your answers would be the same, instead of findings and determinations by the enforcement commissioner of the National Enforcement Commission, the findings and determinations were by the National Enforcement Commission itself?

A. By the National Enforcement Commission itself, the
182 commissioner—is that the point of your question?

Q. What is your answer relative to recommendation to extending the credit agreement—would it be the same if the findings and determinations concerning the disallowance were made by the National Enforcement in Washington?

A. My answer would be the same.

Mr. LUND: That's all. Did you appear in court today pursuant to a subpoena?

The WITNESS: I did.

Mr. LUND: No further questions.

Judge MATHEWS: Cross-examination?

BLEED THROUGH

BLURRED COPY

CROSS-EXAMINATION.

Mr. GRONER:

Q. The answers you have given related to extensions. I take it you are referring to the date of September 30th, 1953?

A. As the question was asked, sir, that was my understanding. My thinking doesn't necessarily confine itself to that particular set of circumstances.

Q. Your answers to the questions related to whether you would recommend an extension beyond September 30th, 1953?

A. Correct.

Q. You were not asked and you did not answer any questions which suggested in any way that we could possibly damage this company before that date? Now, there is another question I would like to ask. You said——

183 A. (Interposing) Was that last time that you're asking me, sir?

Q. I have an additional question. Mr. Lund said you examined the documents at counsel's request. Is it correct then that you didn't take this matter seriously enough from the viewpoint of the bank and the N. E. C. regulations and the possibility of appeal and what they would mean?

A. Obviously I can't answer that question. It involves an inference there. Would you mind repeating it?

Q. Is it true that you examined the documents, the regulations, General Order 15 and so on involved in this case only at the request of counsel?

A. I examined them when they were presented to me for examination by counsel.

Q. When did you first hear about the possibility that there might be some involvement by this firm in enforcement proceedings by the Wage and/or Salary Boards?

A. We were informed sometime ago that proceedings of this nature were in process.

Q. Which proceedings?

A. I haven't familiarized myself with the details of this proceeding.

Q. About how long ago? A year? Two years?

A. The precise date that this first came to our attention, I wouldn't be able to testify as to the precise date it came to

184 me by word of mouth. We were advised under the terms of the credit agreement. We must have been advised and the company carried out that duty of advising us that these proceedings were under way. May I elaborate further?

The company is subject to annual audit by a certified public accountant and the certified public accountant made note of the fact

in their annual audit that these proceedings were under way. I am not acquainted with the details, the A. B. C.'s of this thing as it has progressed from day to day.

Q. Are you acquainted with the details of when you were informed and of what you were informed? Could you find out? If you can't answer, can you refresh your recollection in some way? When did you first find out that this company was involved in some way in these enforcement proceedings?

A. Well, the word of mouth information came to us sometime during '52, I believe, and also from the company formerly advising us of this fact on one occasion in the latter part of 1952 and as I recall, again in the early part of 1953 and then the Price-Waterhouse certified public audit made the year end, 1952, that report was available by the early part of 1953 and, it was made. I might, at this point, say that Price-Waterhouse did not, in their comment, give the details that were involved in this proceeding.

Q. The information that came to you was exclusively in the nature of the regular reports required? They were solicited by you,
185 is that correct?

A. What are you referring to there?

Q. In other words, information as to this enforcement proceeding. Did you go out and ask for it or were you content with the regular reports, the annual audit or the formal reports made by the company at whatever time in 1925 it was made or did you make further inquiries? Is my question clear?

A. Generally, yes. The credit agreement provided that the company advise the banks of material adverse claims pending against them and so far as I know, the company did carry out that provision of the credit agreement.

Now, naturally, we hear things, certainly. As I recall it, an article appeared in the newspaper in Los Angeles sometime in June of this year, I believe, and naturally we made inquiry as to how this matter was progressing.

Q. Can we find out—I guess I have asked this a couple of times. Can we find out when was the first time you were informed by the company of this proceeding, what that notification was and how often it was repeated? Do you have that ? Can you get it?

A. I can get it for you, the letter that the company wrote. I can get for you the audit report of Price-Waterhouse. Perhaps I don't understand exactly why it is necessary to have this precise date.

It is obtainable other than hearsay which would be based on
186 recollection. If it has to do with the coincidence with the extensions of the credit agreement, I think I might, if you question a little further, perhaps I could be more helpful.

Q. As I understand it, if I construe these dates correctly, the last extension was dated December 19, 1952?

BLEED THROUGH

BLURRED COPY

A. That is the date of the so-called Eighth Amendment, I believe.

Q. Yes, that is correct. At that time did you get notification from the company as to dependency of this?

A. I believe we were advised prior to the date of extension of credit indicated by that, Amendment No. 8.

Q. Do you remember anything about that advice? Did it indicate what was involved?

A. It did not indicate any amounts of money. It indicated in a general way the nature of the proceedings, as I recall, and it also gave as the opinion of the company's counsel and of the officers of the company that at that time this company had sufficient merit in its claim to obviate the establishment of a serious liability.

Q. The preceding—before December 9th, 1952, if I read this correctly, there was one October 30th, 1952. Were you informed at that time that there were enforcement proceedings under way?

A. I would like to check the records on that. If you are trying to infer that——

187 Q. I am trying to get at the information involved in this case. I don't have it. I am soliciting your aid in getting it. I am inferring nothing. I would like to ask whether you asked in connection with the extension of December, 1952, whether you made inquiries as to the amount which might be involved?

A. No, sir.

Q. As the company changed its position with respect to having a good defense in the administrative proceedings, so far as you know?

A. I am not an attorney, sir, I couldn't answer that question.

Q. I am asking you whether you know. You indicated before that it was material to you in deciding whether or not to recommend extension of the loan, that they believed they had a good defense. Now, so far as you know, do they still believe that?

Let me ask it a different way.

A. I cannot testify to what someone else has in their mind.

Q. I am asking you what you have in your mind.

A. You are asking me if I believe that they believe that they have a better defense?

Q. Yes. One generally knows when one believes what another has said, especially where one has testified he did believe and took it into account.

188 A. Counsel, I am not endeavoring to be argumentative.

Q. Whatever you are endeavoring to be, you are evasive. Do you still believe it?

A. Do I believe——

Q. Do you believe that the company is still of the position they have a good defense in the administrative proceeding? You can't answer the question? You don't know whether you believe it or not?

A. I haven't answered the question yet.

Mr. LUND: We object on the grounds it is irrelevant and immaterial.

Judge MATHEWS: The objection is sustained.

Mr. GRONER:

Q. Are you aware that there is provision of appeal from the decision of the enforcement commissioner?

A. A provision for appeal from the decision of the enforcement commissioner? Was that your question?

Q. Yes. Do you know whether or not there is one?

A. Well, it was my understanding from reading the regulations, and, bear in mind, I am not a legal mind, that there is provision for appeal to the commissioner by appeal. What kind of appeal do you mean? To the courts? What kind of an appeal are you referring to, sir?

Q. You were asked the question about what conclusions you would draw from a recommended findings and determinations by an enforcement commissioner. Do you believe that those
189 recommendations and determinations are final?

A. Well, as I read the regulations a determination by the commissioner or by the commission is final, insofar as establishing a liability for disallowance of costs, both for income tax purposes and for reimbursement purposes, under the Government contracts.

Q. Now, that decision of the Enforcement Comissioner, in your judgment, is not final? Action by the National Commission is required?

A. I see what you mean. Yes. That is my understanding of it.

Q. Since action by the Enforcement Commissioner is not final, I wonder if you would explain why a recommendation by the Enforcement Commissioner, assuming it were against the company and the company were willing to appeal—let me ask this:

The answer that you gave as to recommending an extension, would you continue to give those answers on the supposition that the company were taking appeal or would you bear with the company during the pendency of that appeal anyway?

A. That decision is not entirely up to me. If you recall the question that was asked, what my recommendation would be to my bank.

Q. I wish to put it——

A. This credit to this company is within the terms and conditions of the credit agreement as a provision that the working capital of the company shall at all times be maintained at a minimum
190 of $1,000,000.

Now, that is a very important provision from the bank's standpoint. If a liability of sufficient contingency arises, so that there is a hazard beyond the control of the company, of the company being placed in a position where it can no longer comply with the

BLEED THROUGH

BLURRED COPY

provision of the credit agreement, the bank and particularly the agent bank, is placed in a position where it cannot extend credit in accordance with the terms and conditions of the credit agreement.

191 Q. Now, would you answer my question? Would you recommend that the loan be extended if a determination had been made by the enforcement commissioner, but the company was appealing to the National Enforcement Commission and they assured you and you believed them that they had a good case before the National Enforcement Commission?

A. You haven't named an amount involved. I can't answer your question until I know what amounts are in your mind.

Q. Why does the amount make a difference?

A. Obviously, if it is 25 cents, it is going to make a difference to $250,000 or two and a half million. My recommendation, if the amount is 25 cents, is going to entirely different than my recommendation if the amount is two and a half million.

Q. If that's the case, is there any point, short of the actual findings of the enforcement commissioner at which you would feel called upon to change your recommendation to your bank?

A. I am not acquainted with the legal effects of these procedural stages. I naturally have to refer to our legal counsel to be fully advised on that, but I am assuming, as I must assume, as a banker, that a contingent liability of sizeable proportions is being created here and if the proportion of that contingency is such that it is likely

192 to place the company in violation of this provision or make the company incapable of maintaining its working capital position, I would be disinclined to suggest that our bank continue to extend credit.

Q. But that situation hasn't come about as yet.

A. As I understand it, this company is now being protected by an injunction.

Q. What if the injunction were vacated in some way?

A. That would present, in my opinion, a contingency that would require very serious consideration and depending upon the amounts involved, depending upon the review of the matter by our legal counsel, I would be then in a position where I would have to appraise the degree of the contingency and the size and amount and that might give me cause and it certainly would change the position that the company is now in.

As I understand it, I am advised that the company is now protected by an injunction from further pursuit of this action which involves a sizeable sum of money which might very conceivably effect the financial condition of the company in a serious way. That is all a matter of opinion; I'm expressing my opinion.

Q. This concerns whether or not you would recommend an extension of a loan which now goes until September 30th, 1953.

A. That is one phase of it, yes, whether as of September, '53, we are going to have to sit down and decide whether this company is going to be entitled to more credit. Now, there are always day to day situations to be pursued.

193

Mr. GRONER: That is all.

REDIRECT EXAMINATION.

Mr. LUND:

Q. To pursue that, if I may, Your Honors, just a moment, the last question by Mr. Groner, if this Enforcement Commissioner should make his findings and determinations, let's say, the first of next month, August of 1953, and in those findings and determinations, determined that the amount of disallowance say, should be two and a half million dollars and that is called to your attention, would that effect the banks in its weekly extensions of credit that it is making to the company?

A. Well, as I understand it, and here again, it is a matter of opinion, from week to week, as Mr. Denny explained here, I believe the company comes in for loans under its existing credit agreement. It has to comply with the terms and conditions of that existing credit agreement if it is going to be entitled to loans from week to week. That working capital limitation is very much a part and a very important one from the banker's standpoint. If a contingency arises here, contingent liability of sufficient proportions so that this company can no longer say with any justification whatsoever that they are protected from this liability, I suppose it would be like moving a shield or closing an umbrella, if you want to use an example, that presents the banker with the question, are you going to make the loan or are you not under those circumstances?

194

Q. You mean the weekly——

A. The weekly loan; any loan.

Q. Mr. Lawler, speaking of contingency, I assume, looking at it from your view and the banker's view, with reference to possible recommendations to your Board of Directors, the seriousness of this contingency or potential liability is much greater, is it not, after an enforcement commissioner has heard the case and made recommendations for disallowance in the substantial amount than the seriousness of this contingency before such determination adverse to the company.

A. In my opinion, that would be the case. I haven't made an analysis.

Mr. LUND: That is all.

BLEED THROUGH

BLURRED COPY

RECROSS-EXAMINATION.

Mr. GRONER:

Q. He said if the company couldn't make the statement about its working capital. What if the company—if the company made the statement, would you accept it? I didn't get that part of your answer. I understood you to say if the company couldn't say in good faith that it had this amount of capital.

A. Working capital.

Q. Working capital, then you have something serious to
195 consider.

A. Yes, it would be unable to comply with the conditions of lending assets for it in the agreement.

Q. What if the company did make a statement that its working capital was sufficient, based on the legal fact that nothing flows from the findings of the enforcement commissioner, but only from the certification of the NEC? What if the Company would say that it does have this working capital?

A. That it actually did not have it?

Q. No, it would have it; if it believed that it would have it and did have it.

A. It is purely a question of fact whether the company has working capital or whether it hasn't and the statements show it.

Q. In other words, until its statements would show that it did not have the working capital, you would recommend extending the working capital to it?

A. No.

Judge FRIEDMAN: Let me ask this question: Let's assume on August 10th, the National Enforcement Commissioner, after a hearing, finds that this company has got to pay a half million dollars and makes that finding and recommends that to the National Enforcement Commissioner. What would you recommend then; right then at that point?

The WITNESS: I would recommend, if you are speaking as
196 to the renewal of the credit agreement, I would recommend that our bank would not renew the agreement on the present terms and conditions.

Now, naturally, I am going beyond that point. It becomes a salvage operation. We are not going to take injurious action and deliberately endeavor to wipe a company out.

Judge FRIEDMAN: You would try to get out as fast as you could?

A. As reasonably as we could.

Judge FRIEDMAN: If the National Enforcement Commissioner recommends that they pay a half million dollars, recommends that they pay that, but the company says, "Well, we have got a pretty

good ground on which to appeal, but the Commissioner has made the recommendation to pay that money." What is your opinion?

A. You are speaking still of the amount of $500,000 now?

Judge FRIEDMAN: Yes.

A. My opinion would be that we would not extend further credit on the same terms and conditions that is now being extended this company. I admit that it has been continually rather close to what the banks regard as its minimum working capital provision of a million. A recent statement submitted, it had a margin of $270,000 and in excess of that, at January 4, 1953, by certified audits, its margin was only some $50,000 in excess of that, so that you build up contingent liabilities here and you are placing
197 the banker in a position where he has to think pretty hard as to whether he wants to continue to extend credit.

Mr. LUND: We have no further questions.

Mr. GRONER: I have one more question.

Mr. GRONER:

Q. What consequences are attached to this disallowance of the $548,000—whatever figure that was—by the Air Force on a completely different basis——

A. I might point out, sir, the dates here are determinable. If you wish to cross-question me on specific dates, they are all in these documents here. This company has at the outset, this credit was advanced in the amount of some $6,000,000 and under a V-loan guarantee, the guarantee was 70 per cent. The various amendments up through the eighth had to do with extending the life of the agreement and other things, but progressively, the extent of the guarantee was increased from 70 to 80 and subsequently to 90 per cent. The $548,000 that was referred to earlier here as being disallowance of another sort, the fact that these disallowances existed and had a good deal to do with the fact that the banks desired a higher guarantee at each stage of renewal of this credit.

Q. But you did continue to sign the extension?

A. He asked me what was the effect of the $548,000.

Q. You continued to send the loans, although disallowances were outstanding of over a half-million dollars?

198 A. They were disallowances in process of negotiating with Government auditors. I think it was pointed out here that portions of those were settled, but the banks considered the previous disallowance of which $548,000 was one, as being sufficient to make them disinclined to extend credit under the 70 per cent guarantee as originally existed.

Q. Do you have any way of guessing what amount would be disallowed if this case were to go to hearing?

BLEED THROUGH

BLURRED COPY

Mr. LUND: We object. It is not within this witness' province to guess or to express any opinion.

Judge MATHEWS: The objection is sustained. I think we ought to proceed with the testimony that has some possible value.

Mr. GRONER: I'm sorry; I didn't hear you.

Judge MATHEWS: We ought to confine ourselves to testimony that has some possible value in the case.

Mr. GRONER: That's all I have.

Mr. LUND: That's all, Your Honors. My last witness should be very short. Perhaps we can conclude before noon. I don't know what your wishes are in reference to lunch.

Judge MATHEWS: We will recess until 2:00 o'clock.

(Whereupon an adjournment was taken until the hour of 2:00 o'clock P.M. this date.)

199 Afternoon Session, Friday, July 24, 1953.
10:00 o'clock A.M.

Judge GOODMAN: I would like to call counsels' attention to the case *Ayrshire Corporation* against *United States*. It was decided in 1946 in 331 U.S. 132, which apparently would make decision by a three-judge statutory court void for lack of jurisdiction and even if the two judges agree, they lack the power to decide in a three-judge statutory court, so that it occurs to us if maybe some good reason for expediting the hearing in determination of this matter so that our good friend Judge Friedman does lose his power to participate in this case and if it can be heard and determined before power to adjudicate ends, then we will be all right, but if not, it may well be that this trial would have to proceed over again with a full three-judge panel. I think counsel might look into that case and take it into their consideration. That might be a good reason for expediting this matter as much as possible.

Mr. LUND: Your Honor, in view of your comment, I believe it probably would be correct if we did run into a problem of appointing a third judge, he could proceed on the basis of the available transcript and exhibits without a re-hearing or re-trial.

Judge GOODMAN: You read this case. The Supreme Court goes pretty far and seems to hold that where there is a three-
200 judge statutory court, it is the three-judges that have to hear and determine the case.

Judge MATHEWS: We hope there won't be any occasion in this case. Do you have another witness?

Mr. LUND: One more witness. Mr. Cook, please.

DONALD W. COOK, called as a witness on behalf of petitioner, having been duly sworn, testified as follows:

The CLERK: Will you state your name, address and occupation to the Court?

The WITNESS: Donald W. Cook, Route 6, Box 671, Tucson, Arizona.

DIRECT EXAMINATION.

Mr. LUND:

Q. You are employed by the Grand Central Aircraft Company?

A. Yes, sir.

Q. Your headquarters for that company are where?

A. Tucson, Arizona.

Q. What is your position with that company?

A. Director of Industrial Relations.

Q. In that capacity, have you been working with the company's counsel in connection with this Wage Stabilization Board Enforcement matter?

201 A. Yes.

Q. Can you tell us, from the beginning of the year 1951, up until approximately to date, what percentage of the work of the company at Glendale and Tucson plants have been performed under Government defense contracts?

A. On a combined basis?

Q. Combined.

A. About 7½ per cent has been commercial and 92½ per cent has been Air Force.

Q. And what has the situation been at the Tucson plant alone?

A. The commercial has been less than one half of one per cent.

Q. Now, at the present time at the Tucson plant, is that still true?

A. That's true.

Q. Now, if the Wage Stabilization Board enforcement proceedings were to go to hearing, do you have a judgment of how many witnesses it would call in that proceeding?

A. We have estimated that it would require at least 34.

Q. What were some of the positions of those witnesses in the plant?

A. They were all in a supervisory capacity during 1951.

Q. And at the present time?

A. All but three are in a supervisory capacity ranking from
202 the factory manager to two superintendents, about 12 foremen and assistant foremen and 10 lead men.

Q. You have one assistant superintendent too?

A. Yes.

Q. What effect, if any, would the absence of those employees from your plant to attend this trial have upon your production at that plant?

BLEED THROUGH

BLURRED COPY

A. Well, it would seriously impair our production schedule, inasmuch as you are taking approximately one-fourth of the key personnel out of the production department.

Q. What is the estimated cost to the company of transporting and paying the wages and the per diems and so forth for these witnesses to attend any hearing in the National Enforcement Commission before a Commissioner?

A. I'd estimate it will be in excess of five to six thousand dollars.

Q. Now, in connection with the pending enforcement proceedings, has the company made any extensive investigations, payroll records, and so on, on its own?

A. Quite extensive, yes.

Q. Can you give us an estimate of what the man hours and cost of that work that has been performed by the company to date in connection with this enforcement proceeding?

A. We estimate that we have spent approximately 7,000 man hours.

203 Q. And a cost to the company of approximately how much?

A. Roughly $14,000.

Q. And solely in connection with the Wage Stabilization Board Administrative Enforcement proceedings, the company has paid substantial amounts in attorney fees?

A. Yes.

Q. In excess of what figure?

A. I would say in excess of $10,000.

Q. Now, if this matter should go to a hearing before an Enforcement Commissioner, would an investigation of records and so on have to be made by the company in preparation?

A. Yes.

Q. Do you have an estimate of how much work would be required in such analysis of records and information?

A. Based on our past experience, I'd say between two and three thousand dollars.

Q. How many personnel records would have to be examined; catalogued?

A. In excess of 3500.

Q. Now, in your estimate of the attorneys' fees that have been paid by the company in connection, to date, in connection with the Wage Stabilization Board Enforcement matter, does that estimate include any part of attorneys' fees in connection with this injunction proceeding?

A. Oh, no.

204 Q. And can you tell us what you anticipate your attorneys' fees would be if the National Enforcement Commission matter proceeded to a hearing before the Enforcement Commissioner?

A. Well, it would depend of course on the amount of work that

was involved and how the hearing went. I'd state about five thousand at least, and possibly ten to fifteen thousand.

Q. When was it that the—I'd better lay a preliminary question. The Wage Stabilization Board through the Wage and Hour Division made an inspection of the payroll of Grand Central Aircraft Company, is that correct?

A. That is correct.

Q. When was that inspection made?

A. One made in the first part of August of 1951.

Q. There was a later one made?

A. There was a major one made in the latter part of March, which extended through April, 1952.

Mr. LUND: That is all.

Mr. GRONER: No questions.

Judge MATHEWS: Any further questions?

Mr. LUND: No further questons.

Judge MATHEWS: Any other witnesses?

Mr. LUND: No, Your Honor.

Judge MATHEWS: I think you were reserving this morning the right, possibly you thought you might wish to further cross-
205 examine Mr. Denny, was it?

Mr. GRONER: Yes. As of this morning, we have no wish to cross-examine him.

Your Honor, I don't know what the procedure ought to be at this point. I would like permission of the Court to make an argument, what we conceive to be the legal issues, particularly in view of the status of the case, we want to make sure that the issues get before the Court in the posture in which we see them.

We have no witnesses to call.

Judge MATHEWS: We were inquiring whether you had any evidence to present.

Mr. GRONER: No, except perhaps—there are additional orders, but Your Honors have ruled that you can take judicial notice of them. Beyond that, there is no evidence we have.

Judge MATHEWS: The evidence then is closed?

Mr. LUND: We rest, Your Honor.

(Witness excused.)

BLEED THROUGH

BLURRED COPY

206 PLAINTIFF'S EXHIBIT "B"

COMPUTATION OF VIOLATIVE PAYROLL, TUCSON PRODUCTIVE UNIT

1. Gross Violative Payroll

Payroll March 4, 1951 (weekly)		119,299.14	
Payroll April 1, 1951 (weekly)		139,374.55	
		258,673.69	
Average weekly payroll		129,336.84	
February 26, 1951 to end of year (in weeks)		.44	
Total Violative Payroll in Unit		5,561,484.11	

2. Excess Payments

A. Increases in February 1951:			
461@ 5¢ per hour	$ 23.10		
811@10¢ per hour	81.10		
442@15¢ per hour	66.30		
73@20¢ per hour	14.60		
7@25¢ per hour	1.75		
Total Hourly Increases	$186.85		
Number receiving these increases 1794			
Average hourly increase per employee		.104	
Increase per 40 hour week		4.16	
Feb. 26, 1951 through Dec. 31, 1951 (44 weeks)		44	
Excess to each employee for period		$183.04	
Multiplied by 1794 employees receiving increases in Feb.		1,794	
Total Excess on February Increases		$328,373.76	
B. Increases in March 1951: 139@ 5¢		6.95	
383@10¢		38.30	
659@15¢		98.85	
464@20¢		92.80	
96@25¢		24.00	$437.75
Average increase per hour ($437.75—1946)			.149
Increase for 40 hour week			$ 7.96
March 26 to Dec. —, 1951—40 week—$7.96			$ 318.40
Multiplied by 1946 employees receiving increases in March (1946)			$619,606.40

207

C. Increases after 7/27/51 granted within 90 days of a previous increase:

(a) August: 67 increases @ 07¢ per hour average		$ 4.59
40 hour week		183.60
9/1/51 through 12/31/51 (in weeks)		17.4
Excess on August increases		$3,194.64
(b) September: 92 increases @ .074 per hour average		$ 6.80
40 hour week		272.00
10/1/51 through 12/31/51 (in weeks)		13
Excess on September increases		$3,536.00
(c) October: 184 @ .075 per hour average		$ 13.80
40 hour week		552.00
11/1/51 through 12/31/51 (in weeks)		8.7
Excess on October increases		$4,802.40
(d) November: 30@.065		$ 1.95
40 hour week		78.00
12/1/51 through 12/31/51 (in weeks)		4.4
Excess on November increases		$ 344.30

Recapitulation

Excess on February increases	$328,373.76
Excess on March increases	619,606.40
Excess on August increases	3,194.64
Excess on September increases	3,536.00
Excess on October increases	4,802.40
Excess on November increases	344.30
	$959,857.50

BLEED THROUGH

BLURRED COPY

208 PLAINTIFF'S EXHIBIT "F"

GRAND CENTRAL AIRCRAFT CO., SCHEDULE OF AVAILABLE CASH
JUNE 21 TO JULY 19, 1953

Cash on Hand and in Banks 6-21-53		$893,547.70
Payments made week ended 6-28-53 (Accounts Payable)	$605,242.46	
Payments made week ended 6-28-53 (Payroll)	237,086.43	
	$842,328.89	
Less: Cash Receipts	80,401.44	761,927.45
		$131,620.25
Plus: Amount Borrowed from Bank 6-25-53		455,209.37
Cash on Hand and in Banks 6-28-53		$586,829.62
Payments made week ended 7-5-53 (Accounts Payable)	$ 72,214.78	
Payments made week ended 7-5-53 (Payroll)	259,816.24	
	$332,031.02	
Less: Cash Receipts	82,987.32	249,043.70
		$337,785.92
Plus: Amount Borrowed from Bank 7-2-53		249,704.89
Cash on Hand and in Banks 7-5-53		$587,490.81
Payments made week ended 7-12-53 (Accounts Payable)	$179,038.73	
Payments made week ended 7-12-53 (Payroll)	201,661.04	
	$380,699.77	
Less: Cash Receipts	98,640.12	282,059.65
		$305,431.16
Plus: Amount Borrowed from Bank 7-9-53		204,702.86
Cash on Hand and in Banks 7-12-53		$510,134.02
Payments made week ended 7-19-53 (Accounts Payable)	$225,724.49	
Payments made week ended 7-19-53 (Payroll)	213,681.39	
	$439,405.88	
Less: Cash Receipts	183,092.78	256,313.10
		$253,820.92
Plus: Amount Borrowed from Bank 7-17-53		329,396.50
Cash on Hand and in Banks 7-19-53		$583,217.42

Note 1: During above period Bank Borrowings Amounted to $1,239,013.62.
Note 2: During above period amount of money collected by Bank and applied against loan $1,050,000.00.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 207397 863



BLEED THROUGH

BLURRED COPY

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 450

ARTHUR P. ALLEN, CHAIRMAN, TWELFTH REGION WAGE STABILIZATION BOARD, ET AL., APPELLANTS

v.

GRAND CENTRAL AIRCRAFT CO., A CALIFORNIA CORPORATION

STATEMENT AS TO JURISDICTION

The Acting Solicitor General, on behalf of the defendants-appellants, and in compliance with Rule 12 of the Supreme Court of the United States as amended, submits herewith a statement particularly disclosing the basis of the jurisdiction of the Supreme Court to review on appeal the judgment of permanent injunction entered by the District Court in this case.

OPINION BELOW

The opinion of the three-judge United States District Court for the Northern District of California, Southern Division, is not yet officially re-

ported. A copy of the opinion and of the findings of fact, conclusions of law and judgment are attached hereto as Appendix A.

JURISDICTION

The judgment of the three-judge District Court, specially convened pursuant to 28 U.S.C. 2282, was entered on July 31, 1953. The petition for appeal was presented to that court on September 24, 1953. The jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by 28 U.S.C. 1253 and 2101(b).

QUESTIONS PRESENTED

1. Whether the District Court erred in holding that the Defense Production Act of 1950 authorizes only the courts and not the President (or his delegee, the National Enforcement Commission) to disallow, for income tax computation and other purposes, wages paid by an employer in excess of applicable wage ceilings, despite the fact that Section 405(b) of the Act specifically empowers and directs the President "to prescribe the extent to which" such excessive wages "shall be disregarded by the executive departments * * * in determining the costs or expenses of any employer" for any purpose.

2. Whether the District Court erred in holding that issuance of a permanent injunction to restrain the administrative proceeding before the National Enforcement Commission was necessary to avoid irreparable injury to appellee.

BLEED THROUGH

BLURRED COPY

STATUTES INVOLVED

The pertinent provisions of the Defense Production Act of 1950 (64 Stat. 798, as amended, 50 U.S.C. 2061 *et seq.*) are set forth in Appendix B attached hereto.

STATEMENT

On November 4, 1952, the Wage Stabilization Board filed a complaint with the National Enforcement Commission against the Grand Central Aircraft Company, appellee here, asserting that the Company had made wage payments in 1951 in contravention of the wage freeze regulations prescribed by the Economic Stabilization Administrator. 16 F.R. 816.[1]

Appellee instituted the instant proceeding by filing a complaint on February 13, 1953, in the District Court for the Northern District of California, Southern Division, to restrain the regional and national officials of the Wage Stabilization Board and of the National Enforcement Commission from proceeding with the administrative hearing scheduled before Enforcement Commissioner Neal, one of the appellants here.

On February 17, 1953, the defendant officials moved to dismiss the complaint. Three weeks later, on March 11, a three-judge court was convened on appellee's application under 28 U.S.C.

[1] The background of the wage stabilization program under the Defense Production Act of 1950 is set forth in detail in our Statement as to Jurisdiction in *Jonco Aircraft Corporation* v. *Franklin, et al.*, docketed September 8, 1953, No. 323, Oct. T., 1953.

2282. That court then issued a temporary restraining order against Enforcement Commissioner Neal and against Norbach, Allen, Hernried, Nachman, and Smith, the five regional officials of the Wage Stabilization Board within the court's jurisdiction.[2] This was followed, on May 28, by an interlocutory injunction issued by the court against the same officials, enjoining them from proceeding with the administrative hearing during the pendency of the action.[3]

An answer to the complaint was filed by the defendant officials on June 12, 1953. The answer asserted that the case was moot as to defendants Allen, Hernried, Nachman, Smith, Killingsworth, Enarson, Lazarus, Ryder, Gregory, Humphrey, and Fuchs, all of whom had by that time left office. The answer also alleged that the court lacked jurisdiction because the Company had failed to exhaust its administrative remedies and had not made any showing of irreparable injury.

---

[2] On April 2, 1953, the defendant officials moved to vacate the temporary restraining order, pointing out that appellee could suffer irreparable injury only if the administrative hearing culminated in issuance of a disallowance certificate. The motion to vacate also stated that if the administrative proceeding before the Enforcement Commissioner was allowed to continue, no certificate of disallowance would be issued by the National Enforcement Commission until two weeks after the Commission's final decision, which would have enabled appellee, during that two-week period, to seek any judicial remedies it might then desire. The District Court denied the motion on May 11, 1953.

[3] On June 15, 1953, this Court denied an application by defendants Norbach and Neal for a stay of the interlocutory injunction, with the Chief Justice and Mr. Justice Burton dissenting.

BLEED THROUGH

BLURRED COPY

On July 31, 1953, the three-judge court, after trial, decided (1) that the Defense Production Act of 1950 allows only the courts and not the President or the National Enforcement Commission to impose tax disallowances for illegal wage payments and (2) that appellee would be irreparably damaged by continuance of the administrative hearing before the National Enforcement Commission. A judgment permanently enjoining the proceeding scheduled for hearing by Enforcement Commissioner Neal was accordingly entered on the same date.

THE QUESTIONS ARE SUBSTANTIAL

The holding of the court below that the Defense Production Act does not authorize administrative determination and disallowance of excessive wage payments undermines the entire wage stabilization enforcement program, both as to past and pending proceedings. This three-judge decision, like that in the *Jonco Aircraft* case now on appeal before this Court,[4] jeopardizes the 2,000 administrative proceedings which have already resulted in tax disallowances by the National Enforcement Commission. In over 400 additional administrative proceedings, disallowances, stipulated or determined by the Commission, have not yet been certified. Approximately 100 other proceedings are also currently pending before the Commission or are in the process of administrative negotiation. In these additional cases, the estimated dollar amount is two million dollars.

[4] *Jonco Aircraft Corporation* v. *Franklin, et al.*, filed September 8, 1953, No. 323, Oct. T., 1953.

The decision below, branding as illegal the administrative proceedings upon which all of these past tax disallowances under the wage stabilization program were based, will, if allowed to stand uncorrected, inevitably result in thousands of tax refund claims and suits.[5] The decision, we submit, flies in the face of the plain language of Section 405(b) of the Defense Production Act, ignores the pertinent legislative history of that Act and the Stabilization Act of 1942, from which it was derived, and is in conflict with decisions of two courts of appeals recognizing the administrative power to determine and certify tax disallowances in wage overpayment cases. Moreover, we believe that the court below committed plain error in holding that appellee would be irreparably damaged by continuation of the administrative proceeding before the National Enforcement Commissioner. Its holding on this aspect of the case, conflicts squarely with the recent decision of another three-judge court dismissing a complaint filed by the appellee to enjoin a similar administrative proceeding instituted against it before the Commission by the Salary Stabilization Board. See *Grand Central Aircraft Company* v. *Jones, Enforcement Commissioner, et al.*, No. 15603, S. D. Cal., Central Div., decided August 31, 1953.

---

[5] Applicable statutes of limitations on such claims and suits have not yet run as to most, if not all, of the administrative disallowances certified by the National Enforcement Commission under the 1950 Act.

BLEED THROUGH

BLURRED COPY

I

Section 405(b) of the Defense Production Act of 1950 Empowers the President To Certify and Impose Tax Disallowances

A. *The Terms of the Act*

Section 405(b) employs precise and unambiguous language in authorizing the tax disallowance sanction to be imposed administratively rather than by recourse to the courts. First, it prohibits payment by an employer and receipt by an employee of any wages in excess of the permissible ceilings. Then, in specific terms, it authorizes *the President* to direct the executive departments to disregard for tax computation and other purposes wages paid in violation of those ceilings:

> * * * The President shall also prescribe the extent to which any wage, salary, or compensation payment made in contravention of any such regulation or order shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation. * * *

The vesting of this power in the President, rather than in the courts, is, we submit, the short and conclusive answer to the suggestion of the court below that this power was lodged exclusively in the judiciary.

Other provisions of the Defense Production Act of 1950 confirm the view that Congress deliberately conferred this power on the President to be exercised administratively. Indeed, the thrust of the

entire Act was to arm *the President* with all authority necessary to combat inflation and maintain a stable economy. Thus Section 2 of the Act (50 U. S. C. App. 2061) expressly states that "It is the objective of this Act to provide *the President* with authority to accomplish" the purposes of the Act (emphasis supplied). Section 402(b)(1) of the Act (50 U. S. C. App. 2102(b)(1)) authorizes *the President* to impose ceilings on the price of commodities and services and also on wages and salaries. In imposing such ceilings, it is *the President* who is authorized by Congress to "make such adjustments as he deems necessary to prevent or correct hardships or inequities." Section 402(c), 50 U. S. C. App. 2102(c). In addition, Section 402 (f) empowers *the President* to exempt from wage control any type of employment for which he finds such control not necessary. 50 U. S. C. App. 2102 (f). We submit that this plenary power conferred on the President over wage control by the cited provisions of the Act attests to the fact that Congress meant what it said in Section 405(b) when it empowered the President, rather than the courts, not only to determine the extent of any wage ceiling violation but to direct the executive departments to disregard such overpayments for tax computation and other purposes.

No different result, despite the assertion of the court below, is warranted by Sections 706(a) and (b) of the Defense Production Act (Appendix B, *infra*). To the contrary, those provisions, to the extent here pertinent, furnish additional support

BLEED THROUGH

BLURRED COPY

for the view that Congress intended the tax disallowance sanction to be imposed administratively and not by the courts. Sections 706(a) and (b) confer jurisdiction on the District Courts over injunction suits to restrain violations of the Act and over criminal proceedings thereunder. Certainly, if Congress had also intended the tax disallowances to be imposed by the District Courts rather than administratively, Section 706 would have been the appropriate place in the Act for articulation of that intent. But not a syllable in the entire section refers to the tax disallowance sanction. And Section 405(b) itself, which establishes that sanction, far from authorizing its imposition judicially, expressly calls, as we have shown, for Presidential or administrative imposition.[6]

B. *Legislative History*

Pertinent legislative history materials further emphasize the error of the holding below that the disallowance sanction under Section 405(b) was to be imposed by the courts and not administratively.

1. Section 405(b) of the 1950 Act is derived

[6] Section 703(a) of the Defense Production Act (Appendix B, *infra*) authorizes the President "to delegate any power or authority conferred upon him by this Act to any officer or agency of the Government, including any new agency or agencies * * * and he may authorize such redelegations by that officer or agency as the President may deem appropriate." Accordingly, the delegation by the President of his tax disallowance power to the National Enforcement Commission through the Economic Stabilization Agency was in full conformity with Section 703(a). See Executive Order 10161, 15 F.R. 6105 (creating the Economic Stabilization Agency); General Order No. 18, 17 F.R. 6925, 9977 (creating the National Enforcement Commission).

from, and in all material respects, identical with Section 5(a) of the Stabilization Act of 1942, 50 U. S. C. App. 965(a), 56 Stat. 767. S. Rept. 2250, 81st Cong., 2d Sess., p. 39. From 1942 to 1947, the War Labor Board and later the National Wage Stabilization Board, acting under Section 5(a) of the 1942 Act, disposed of almost 100,000 wage violation cases, imposing disallowance sanctions in over 12,000 cases. In each of these cases, it was the Board, and not the courts, which made the finding of wage violation and determined the disallowance. See The National Wage Stabilization Board (January 1, 1946—February 24, 1947), pp. 230, 232-235; Termination Report, National War Labor Board (January 12, 1942—December 31, 1945), Vol. I, pp. 437-441.

Measured against this background, it is obvious that congressional enactment of Section 405(b) in 1950, using the identical language contained in Section 5(a), was intended to carry forward under the 1950 Act the same administrative enforcement procedure which had been the heart of the wage stabilization program under Section 5(a) of the 1942 Act. See *Commissioner* v. *Weisman*, 197 F. 2d 221, 223 (C. A. 1).[7]

2. The legislative history of the 1954 Supplemental Appropriation Bill (H. R. 6200, 83rd Cong., 1st Sess.) points to the same conclusion. It discloses full congressional awareness (1) that the tax

[7] See also H. Rept. 639, on H.R. 3871, 82d Cong., 1st Sess., at p. 40 (recognizing the "disallowance authority" of the President under Section 405(b) with respect to wage regulation violations.

BLEED THROUGH

BLURRED COPY

disallowance sanction provided by Section 405(b) was being imposed administratively through the National Enforcement Commission and (2) that the moneys sought for 1954 for the Economic Stabilization Agency were to be used to wind up and liquidate such administrative proceedings before the Commission. H. Doc. 176, 83d Cong., 1st Sess., p. 5; Hearings Before Subcommittee of House Committee on Appropriations on the 1954 Supplemental Appropriation Bill, H. R. 6200, 83dl Cong., 1st Sess., pp. 440-442; Hearings Before the Senate Committee on Appropriations on the Supplemental Appropriation Hill, H. R. 6200, 83rd Cong., 1st Sess., pp. 424, 430, 431; Conference Report (H. Rept. No. 1090) on H. R. 6200, 83rd Cong., 1st Sess., Amendment No. 76, 99 Cong. Rec. 11219. Apart from all other considerations, congressional enactment of H. R. 6200 into Public Law 207 on August 7, 1953, specially appropriating, in Chapter XI, funds "for liquidation of the Economic Stabilization Agency" for the fiscal year ending June 30, 1954, constitutes, we submit, an acceptance and ratification by Congress of the use of the administrative proceeding to enforce the tax disallowance sanction. See *Fleming* v. *Mohawk Co.*, 331 U. S. 111; *Brooks* v. *Dewar*, 313 U. S. 354.

3. The legislative history of the 1954 Supplemental Appropriation Bill is also important because it discloses the concession by counsel for appellee before the Senate Appropriations Committee as to the propriety of the very administrative proceeding enjoined by the court below. In July

1953, counsel for appellee urged the Committee to refuse to appropriate funds for liquidation of the wage stabilization program and argued that such funds should not be allocated for use by the National Enforcement Commission of the Economic Stabilization Agency for administrative proceedings initated before the Commission after April 30, 1953.[8] Such a proceeding had in fact been instituted on May 5, 1953, against appellee before the Commission by the Salary Stabilization Board.[9] An earlier and entirely distinct proceeding—the one enjoined by the court below and involved here—had been instituted against appellee before the Commission by the Wage Stabilization Board on November 4, 1952, several months in advance of the allegedly critical cut-off date of April 30, 1953. The colloquy between Mr. Holland, counsel for appellee, and Senator Cordon, Chairman of the Senate Appropriations Committee, shows that on July 23, 1953, counsel, while challenging the later salary proceeding filed after April 30, 1953, fully recognized that the first administrative proceeding in-

[8] April 30, 1953, is the termination date for "all authority conferred" on agencies such as the National Enforcement Commission and its parent organization, the Economic Stabilization Agency. Section 717(a) of the Defense Production Act of 1950, 50 U.S.C. App. 2166(a), as amended by Section 121(b) of the Act of June 30, 1952, 66 Stat. 306. But Section 717(b)(3) of the 1950 Act specifically authorizes such agencies to "continue in existence for purposes of liquidation" for an additional six months, *i.e.*, until October 31, 1953. 50 U.S.C. App. 2166(b)(3), 65 Stat. 110.

[9] Appellee's attempt to enjoin this administrative proceeding was unsuccessful. *Grand Central Aircraft Company* v. *Jones, Enforcement Commission, et al.*, No. 15603, S.D. Cal., Central Div., decided August 31, 1953.

BLEED THROUGH

BLURRED COPY

stituted before the National Enforcement Commission by the Wage Stabilization Board was "all right":

> Mr. HOLLAND. * * *
>
> We are involved in an enforcement proceeding before the Economic Stabilization Agency. That proceeding started with the complaint filed last November in a wage case and a salary complaint which was filed this last May.
>
> The problem that we have with this appropriation—
>
> Senator CORDON. You do not question but what it was all right for the Economic Stabilization Agency at that time to inquire into the particular matter, do you?
>
> Mr. HOLLAND. Yes, sir.
>
> *The first one is all right;* the second one came during what is the liquidation period. And we do not believe it was appropriate for the Agency to start new cases. Our idea of liquidation would certainly be limited to the cases they had. [Hearings Before the Senate Committee on Appropriations, on the 1954 Supplemental Appropriation Bill, H. R. 6200, 83d Cong., 1st Sess., at p. 427 (emphasis supplied).]

C. *Decisions of Other Courts*

Several decisions under the 1942 Act recognized that the tax disallowance power was to be exercised administratively. Thus, in *Troy Laundry Co.* v. *Wirtz*, 155 F. 2d 53, 55 (C. A. 9), certiorari denied, 329 U. S. 723, the court declared it "obvious that it

was within the executive power of the President to inquire and determine the extent of appellant's wage overpayments, if any." See also *De La Rama S. S. Co.* v. *Pierson*, 174 F. 2d 84 (C. A. 9). The legality of the use of administrative procedure under Section 5(a) has also been upheld in two recent cases. *N. A. Woodworth Co.* v. *Kavanagh*, 102 F. Supp. 9 (E. D. Mich., 1952), affirmed "for the reasons and on the grounds stated in the opinion of the District Court," 202 F. 2d 154 (C. A. 6); *Weather-Seal Mfg. Co.* v. *Commissioner*, 16 T. C. 1312, affirmed, 199 F. 2d 376 (C. A. 6). While these cases involved the 1942 Act, they necessarily sustain the validity of proceeding administratively under the identical provisions of Section 405(b) of the 1950 Act.

II

The Court Below Erred In Finding That Appellee Would Suffer Irreparable Injury

A clear showing of irreparable injury is, of course, crucial to the exercise of the equity jurisdiction which was here involved. The court below found such irreparable injury only because of an "overhanging threat of the disallowance penalties," which would cause the banks to withdraw credit extended to appellee and force it into bankruptcy. But any such "threat," if made by the defendant officials enjoined below, was an empty one and could not therefore serve as a proper basis for a finding of irreparable injury. The defendant officials enjoined below—the regional officers of the Wage Stabilization Board and National Enforce-

BLEED THROUGH

BLURRED COPY

ment Commission—were not empowered to assess any tax disallowance sanction or any other penalty. The defendant Enforcement Commissioner Neal is not authorized to issue any certificate of disallowance. He can do not more than issue a purely advisory opinion to the National Enforcement Commission. His recommendation, having none of the earmarks of finality or conclusiveness, no more affects the Company's credit standing than does the actual filing of the complaint by the Wage Stabilization Board before the National Enforcement Commission.

It is only the Commission in Washington which has the power to reach a final decision and to certify disallowances. General Procedure Regulation No. 1, Rev., 17 F. R. 7740. And, as conceded by appellee, the "defendants [in this case] do not include the National Enforcement Commission or its members." See page 6 of Objections of Respondent to Application for a Stay of Interlocutory Injunction, filed in this Court in *Norbach, et al. v. Grand Central Aircraft Co.*, June 15, 1953. See footnote 3, *supra*. Since the only officers who are in a position to impose the disallowance penalties are not parties to the proceeding, we submit that the court committed plain error in finding that the "threat" of these penalties exposed appellee to irreparable injury.

This error of the court below in its finding of irreparable injury is highlighted by the direct conflict between that finding and the recent decision of a differently-constituted three-judge court in

another case involving the same company and involving identical allegations of irreparable injury. *Grand Central Aircraft Co.* v. *Jones, Enforcement Commission, et al.*, No. 15603, S. D. Cal., Central Div.

In this latter case, appellee sought an injunction to restrain an administrative proceeding filed against it before the National Enforcement Commission by the Salary Stabilization Board. An affidavit filed in support of the claim of irreparable injury was in all respects the same as that filed in the court below in the instant case involving the Wage Stabilization Board. Indeed, the only difference between the two affidavits was reflected in amounts asserted by the two Boards to have been paid by appellee in contravention of the stabilization regulations. As stated by appellee:

> In the Allen suit [i.e., the instant case], the claimed illegal wages, according to the WSB, amounted to $5,561,484. In the [Jones] suit, the claimed illegal salaries, according to the office of Salary Stabilization, amounted to $8,000,000.[10]

Thus, the maximum tax disallowance penalty in the *Jones* or Salary Stabilization case was considerably in excess of that involved in the instant suit. Nevertheless, the three-judge court in the *Jones* case rejected the argument that continuation of the Salary Stabilization proceeding before the National

[10] Plaintiff's Supplemental Memorandum in Support of Application for Interlocutory Injunction, p. 4, filed in the District Court in the *Jones* case.

BLEED THROUGH

BLURRED COPY

Enforcement Commission would work irreparable injury to appellee. And in dismissing appellee's complaint for injunctive relief in the *Jones* suit, the three-judge court held that the asserted irreparable injury,

> * * * is not the sort of irreparable injury against which equity protects." [*Petroleum Expl., Inc.* v. *Public Serve. Comm'n.*, 304 U.S. 209, 220-221 (1938); cf. *Myers* v. *Bethlehem Shipbuilding Corp., supra*, 303 U.S. at 51-52; *Beal* v. *Missouri Pac. R. Co.*, 312 U.S. 45, 49-50 (1941)];
>
> that in all events plaintiff, [i.e., *Grand Central Aircraft Company*] has "a full, adequate and completely available remedy at law." [see *Aircraft & Diesel Equip. Corp.* v. *Hirsch, supra*, 331 U.S. at 774-781; *Coffman* v. *Breeze Corps.*, 323 U.S. 316, 322-323 (1945); *Fed. Trade Com.* v. *Claire Furn. Co.*, 274 U.S. 160, 174-175 (1927); *Dalton Machine Co.* v. *Virginia*, 236 U.S. 699, 701 (1915); *cf. Cruikshank* v. *Bidwell*, 176 U.S. 73, 81-82 (1900)], in the federal courts [*Petroleum Expl. Inc.* v. *Pub. Serv. Comm'n., supra*, 304 U. S. at 217; *cf. Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 98-99 (1949)]; and
>
> that since plaintiff [i.e., *Grand Central Aircraft Company*] has failed, for the reasons mentioned, to state a claim within the equitable jurisdiction of the court [*Matthews* v. *Rodgers*, 284 U.S. 521, 524-525 (1932); *Twist* v. *Prairie Oil & Gas Co.*, 274 U.S. 684, 689-691 (1927)], "and the defect in the bill is incapable of remedy by amendment, its dismissal should

be directed" [*Myers* v. *Bethlehem Shipbuilding Corp., supra,* 303 U.S. at 42-53; *Mast. Foos & Co.* v. *Stover Mfg. Co.,* 177 U.S. 485, 494-495 (1900)]. [Order by Three-Judge Court (Circuit Judge Stephens and District Judges Mathes and Carter) on Plaintiff's Application for Preliminary Injunction and Defendant's Motion to Dismiss, filed in *Jones* case, on August 31, 1953.]

That holding, we submit is correct and is the dispositive answer to the irreparable injury argument put forth in the instant case.

CONCLUSION

For the reasons stated, the judgment of permanent injunction entered by the court below should be reversed.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

BLEED THROUGH

BLURRED COPY

APPENDIX A

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

No. 32541

GRAND CENTRAL AIRCRAFT CO., A CALIFORNIA CORPORATION, PLAINTIFF

vs.

ARTHUR P. ALLEN, CHAIRMAN, TWELFTH REGION WAGE STABILIZATION BOARD; RUDOLPH F. HERNRIED, MEMBER TWELFTH REGION WAGE STABILIZATION BOARD; ERNEST A. NORBACH, TWELFTH REGION COUNCIL, JOSEPH I. NACHMAN, CHIEF OF RULINGS AND OPINIONS AND BRANCH TWELFTH REGION WAGE STABILIZATION BOARD; JEROME SMITH, CHIEF ENFORCEMENT ATTORNEY, TWELFTH REGION WAGE STABILIZATION BOARD; CHARLES C. KILLINGSWORTH, CHAIRMAN WAGE STABILIZATION COMMITTEE; H. L. ENARSON, HERMAN LAZARUS AND MEYER S. RYDER, MEMBERS OF WAGE STABILIZATION COMMITTEE; PHIL C. NEAL, ENFORCEMENT COMMISSIONER; CHARLES O. GREGORY, CHAIRMAN NATIONAL ENFORCEMENT COMMISSION; HELEN F. HUMPHREY, RALPH F. FUCHS, AND LAWSON F. BERNSTEIN, MEMBERS OF NATIONAL ENFORCEMENT COMMISSION; ISAAC GRONER, CHIEF COUNSEL FOR WAGE STABILIZATION COMMITTEE; DOE ONE, DOE TWO, DOE THREE, DOE FOUR, DOE FIVE AND DOE SIX, DEFENDANTS

1. Opinion

(Mathews, United States Circuit Judge; Goodman, United States District Judge; and Friedman, United States District Judge.)

FRIEDMAN, United States District Judge:

This is an action to enjoin officials of the Wage Stabilization Board and of the National Enforcement Commission from continuing administrative proceedings against Grand Central Aircraft Company in Case No. 12-122 now pending before the Commission. The charges brought by the Wage Stabilization Board in a Complaint filed on November 4, 1953, allege violations of Sec. 405(b) of the Defense Production Act of 1950, as amended, (50 U.S.C. App. 2105(b)) and of regulations and orders issued thereunder. Specifically, the Board alleged that Grand Central Aircraft Company had made wage payments to its employees in 1951 in contravention of General Wage Stabilization Regulation 1, popularly known as "the wage freeze", promulgated by the Economic Stabilization Administrator. A hearing on the allegations of that Complaint was set for February 24, 1953, before Enforcement Commissioner Phil C. Neale, at Los Angeles, California. On February 13, 1953, the company filed its Complaint in the District Court for the Northern District of California, Southern Division, against regional and national officials of the Wage Stabilization Board and of the National Enforcement Commission to enjoin them from proceeding with the administrative hearing. The administrative hearing was then postponed, pending judicial action. On February 17, 1953, the defendant officials moved to dismiss the Complaint. On March 11, 1953, a Three-Judge Court was appointed, pursuant to 28 U.S.C. 2282; and after a hearing on March 20, 1953, the Court issued a Temporary Restraining Order directed against the regional offi-

BLEED THROUGH

BLURRED COPY

cials who were within the Court's jurisdiction and took under advisement the company's motion for a preliminary injunction and the defendant's motion to dismiss the Complaint. On April 2, 1953, the defendants filed a motion to vacate the Temporary Restraining Order; the Three-judge Court heard argument on that motion and took the matter under advisement on May 1, 1953. On May 11, 1953, the Court issued a Memorandum Order for Interlocutory Injunction, finding that there were grave and important questions of law and fact to be determined on trial, and that if an Interlocutory Injunction were not granted, the company would suffer irreparable damage and ordered that an Interlocutory Injunction issue. On May 28, 1953, the Court issued the Interlocutory Injunction enjoining the regional officials of the Wage Stabilization Board and the Enforcement Commissioner from proceeding with the administrative proceedings upon condition that plaintiff post bond in the sum of One Thousand ($1,000.00) Dollars for the payment of costs and damages, should it develop that any party was wrongfully enjoined. (The Court reserved decision on the motion to dismiss the Complaint.)

The Acting Solicitor General of the United States applied to the Supreme Court on June 5, 1953, for a stay of the Interlocutory Injunction granted by this Court; the Supreme Court denied the application on June 15, 1953. The case came on for trial before this Court on July 24, 1953, and was submitted that day.

The undisputed evidence convincingly showed that the plaintiff would be irreparably damaged by the continuance of the administrative proceedings.

The plaintiff is engaged in the reconditioning of aircraft engines and equipment. It employs several thousand employees. Its plants are located in Southern California and Arizona. Over seventy-five per cent of its production is for defense purposes arising out of government contracts. During the course of the administrative proceedings, plaintiff was advised in writing by the representatives of the Enforcement Commission that it proposed to assess penalties by way of a recommendation of disallowance of deductions for tax purposes, if the evidence showed violation of the statute and regulations, in maximum amounts of from Two to Three Million Dollars. The testimony showed that the plaintiff had established a credit of Six Million Dollars with a group of Los Angeles banks and that its current borrowings were in excess of One Million Dollars. The evidence further showed that the continuance of the administrative proceedings with the over-hanging threat of the disallowance penalties would cause the banks to withdraw the credit extended, resulting in a shut down of plaintiff's business, concellation of its government contracts, and consequent bankruptcy. Without more, the evidence is persuasive as to irreparable damage.

Plaintiff urges several grounds which it claims legally justify the issuance of a permanent injunction, among them asserted Constitution infirmities in the Defense Production Act of 1950. Since we are of the opinion that the cause can be justly decided without resolving the tendered Constitutional questions, we do not reach them.[11]

[11] It has long been an established legal policy that Courts should not unnecessarily determine Constitutional issues. Hurd v. Hodge, 334 U.S. 24, 30, 68 S. Ct. 847, 92 L. Ed. 1187;

BLEED THROUGH

BLURRED COPY

Other substantial grounds are urged to support the judgment in favor of plaintiff: That (1) the savings clause in the general statute clause in the general statute (1 U.S.C. 109) does not cover this administrative proceeding; that (2) this is not a suit, action, or prosecution under the savings clause of the Defense Production Act of 1950 (50 U.S.C. App. 2156(b)); and that (3) the provisions for the termination of the Act provide only for a continued existence for a period not to exceed six months for purposes of liquidation, and that this administrative proceeding is not part of the liquidation. (50 U.S.C. App. 2166(b)(3).) These contentions appear to have substantial merit, but we do not find it necessary to pass upon them.

It is sufficient to say that we are unable to perceive in the Defense Production Act any authority for the imposition of penalties by the National Enforcement Commission. To the contrary, the statute vests jurisdiction in the District Courts of the United States of all actions under the Act to enforce any liability or duty created thereby. (50 U.S.C.

Rescue Army v. Municipal Court, 1947, 331 U.S. 549, at Page 569, 67 S. Ct. 1409, 91 L. Ed. 1666; Alma Motor Co. v. Timkin-Detroit Axle Co., 1946, 329 U.S. 129, 136, 67 S. Ct. 231, 91 L. Ed. 128; Arkansas Fuel Co. v. State of Louisiana ex rel. Muslow, 1938, 304 U.S. 197, 202, 58 S. Ct. 852, 82 L. Ed. 1287; Baker v. Grice, 1898, 169 U.S. 292, 18 S. Ct. 323, 42 L. Ed. 748. There would appear to be no good reason why this doctrine should not apply to courts constituted as this one is. See Morgan v. U.S. 107 F. Supp. 501, at 504, and also United Air Lines, Inc. v. Public Utilities Commission, 109 F. Supp. 13.

This Three-judge Court, having properly acquired jurisdiction, has power to pass upon non-constitutional questions involved in the suit. Louisville & Nashville Railroad Co. v. Garrett, 231 U.S. 298; Firemen's Ins. Co. v. Beha D.C., 30 F. 2d 539; United Air Lines, Inc. v. Public Utilities Commission, supra.

App. 2156(b)) It is true that the Act authorizes the President to prescribe the *extent* to which any unauthorized payment made by an employer to an employee may be disregarded by Executive Departments (such as the Treasury) in determining gain for tax purposes. (50 U.S.C. App. 2105(a)) But the statute nowhere vests in the President or in any delegated agency the power to actually impose penalties.

We unanimously conclude that a judgment for a permanent injunction as prayed should enter herein. See Jones Aircraft Corporation v. Franklin, et al., No. 5122, District Court, Northern District of Texas, decided July 15, 1953, not yet reported.

Dated: July 31, 1953.

(S.) MONROE M. FRIEDMAN,
United States District Judge.

2. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial before the above entitled Court on July 24, 1953. Parties hereto appearing by their respective counsel, and the Court having heard evidence, and the testimony of witnesses and the arguments of counsel, and briefs having been submitted.

Now Therefore, upon due consideration, the Court makes the following:

FINDINGS OF FACT

1. The allegations of Paragraphs II, III, V, VI, VIII, IX, X, XI, and XII of plaintiff's Complaint are true.

BLEED THROUGH

BLURRED COPY

2. Prosecution of the Complaint issued by the Wage Stabilization Board will cause irreparable damage to the plaintiff for the reasons stated in Paragraph XV of plaintiff's Complaint. The Court further finds that the continuance of the threatened administrative proceeding will cause plaintiff's bank credit to be shut off and will disable plaintiff from continuing its operations.

Conclusions of Law

The Court finds that there is no statutory authority for the imposition of penalties by the National Enforcement Commission and the threat of such enforcement will cause irreparable damage to the plaintiff and, therefore, a permanent injunction should be granted restraining the defendants from further prosecution of the proceeding against plaintiff in Case No. 12-122 now pending before the National Enforcement Commission with respect to any alleged violations of the Defense Production Act of 1950, as originally enacted and as amended, or of any regulations or orders issued pursuant thereto.

Let a permanent injunction issue forthwith.

Dated: July 31, 1953.

(S.) Clifton Mathews,
United States Circuit Judge.
(S.) Louis E. Goodman,
United States District Judge.
(S.) Monroe M. Friedman,
United States District Judge.

Endorsed: Filed 4:30 P. M., July 31, 1953, C. W. Calbreath, Clerk.

3. Judgment of Permanent Injunction

The petition of plaintiff for permanent injunction came on regularly to be heard on July 24, 1953, before the above entitled District Court, consisting of the Honorable Clifton Mathews, United States Circuit Judge, the Honorable Louis E. Goodman, United States District Judge, and the Honorable Monroe M. Friedman, United States District Judge.

All parties appeared by counsel, and the Court heard the evidence and the arguments of counsel, and briefs were filed by the parties; the matter was submitted to the Court for its decision.

Upon due consideration thereof, it appears to the Court, for the reasons stated in the Opinion filed, that petitioner should be granted the relief prayed for in its petition. Findings of Fact and Conclusions of Law have heretofore been filed.

It Is Hereby Ordered, Adjudged and Decreed that the defendants, Arthur P. Allen, Chairman, Twelfth Region Wage Stabilization Board, Rudolph Hernried, Member Twelfth Region Wage Stabilization Board, Ernest A. Norbach, Twelfth Region Counsel, Joseph I. Nachman, Chief of Rulings and Opinions Branch Twelfth Region Wage Stazilization Board, Jerome Smith, Chief Enforcement Attorney, Twelfth Region Wage Stabilization Board, and Phil C. Neal, Enforcement Commissioner, and each of said defendants, and their agents, servants, attorneys and successors in office are hereby permanently restrained and enjoined from prosecuting, hearing any charges brought against, or otherwise proceeding against plaintiff in Case No. 12-122 now pending before the said

BLEED THROUGH

BLURRED COPY

National Enforcement Commission or with respect to any alleged violations of the Defense Production Act of 1950, as originally enacted and as amended, or of any regulations or orders issued pursuant thereto.

Dated: July 31, 1953.

(S.) CLIFTON MATHEWS,
United States Circuit Judge.
(S.) LOUIS E. GOODMAN,
United States District Judge.
(S.) MONROE M. FRIEDMAN,
United States District Judge.

Endorsed: Filed 4:30 P. M. July 31, 1953, C. W. Calbreath, Clerk.

APPENDIX B

PERTINENT SECTIONS OF THE DEFENSE PRODUCTION ACT OF 1950

The Defense Production Act of 1950 (64 Stat. 798, as amended, 50 U. S. C. App. 2061 *et seq.*) provides in pertinent part:

> Section 405. (a) It shall be unlawful, regardless of any obligation heretofore or hereafter entered into, for any person to sell or deliver, or in the regular course of business or trade to buy or receive, any material or service, or otherwise to do or omit to do any act, in violation of this title or of any regulation, order, or requirement issued thereunder, or to offer, solicit, attempt or agree to do any of the foregoing. The President shall also prescribe the extent to which any payment made, either in money or property, by any person in viola-

tion of any such regulation, order, or requirement shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any such person for the purposes of any other law or regulation, including bases in determining gain for tax purposes.

(b) No employer shall pay, and no employee shall receive, any wage, salary, or other compensation in contravention of any regulation or order promulgated by the President under this title. The President shall also prescribe the extent to which any wage, salary, or compensation payment made in contravention of any such regulation or order shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation.

Section 703. (a) Except as otherwise specifically provided, the President may delegate any power or authority conferred upon him by this Act to any officer or agency of the Government, including any new agency or agencies (and the President is authorized to create such new agencies, other than corporate agencies, as he deems necessary) and he may authorize such redelegations by that officer or agency as the President may deem appropriate. The President is authorized to appoint heads and assistant heads of any such new agencies, and other officials therein of comparable status, and to fix their compensation, without regard to the Classification Act of 1949, as amended, the head of one such agency to be paid at a

BLEED THROUGH

BLURRED COPY

rate comparable to the compensation paid to the heads of executive departments of the Government, and other such heads, assistant heads, and officials at rates comparable to the compensation paid to the heads and assistant heads of independent agencies of the Government. Any officer or agency may employ civilian personnel for duty in the United States, including the District of Columbia, or elsewhere, without regard to section 14 of the Federal Employees Pay Act of 1946 (60 Stat. 219), as the President deems necessary to carry out the provisions of this Act.

(b) The head and assistant heads of any independent agency created to administer the authority conferred by title IV of this Act shall be appointed by the President, by and with the advice and consent of the Senate. There shall be included among the policy-making officers of each regional office administering the authority conferred by title IV of this Act a resident of each State served by such office whose governor requests such representation.

Section 706. (a) Whenever in the judgment of the President any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the President that such person has engaged or is about to engage in any such acts or practices a permanent or tempo-

rary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.

(b) The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this Act or any rule, regulation, order, or subpena thereunder, and of all civil actions under this Act to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, order, or subpena thereunder. Any criminal proceeding on account of any such violation may be brought in any district in which any act, failure to act, or transaction constituting the violation occurred. Any such civil action may be brought in any such district or in the district in which the defendant resides or transacts business. Process in such cases, criminal or civil, may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found; the subpena for witnesses who are required to attend a court in any district in such case may run into any other district. The termination of the authority granted in any title or section of this Act, or of any rule, regulation, or order issued thereunder, shall not operate to defeat any suit, action, or prosecution, whether theretofore or thereafter commenced, with respect to any right, liability, or offense incurred or committed prior to the termination date of such title or of such rule, regulation, or order. No costs shall be assessed against the United

BLEED THROUGH

BLURRED COPY

States in any proceeding under this Act. All litigation arising under this Act or the regulations promulgated thereunder shall be under the supervision and control of the Attorney General.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 279193 999

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement:	
1. The legislative and regulatory background	2
(a) The Defense Production Act	2
(b) The Regulations issued under the Defense Production Act	3
(c) The deactivation of the Wage Stabilization Program	10
2. The controversy here involved	11
(a) The administrative proceedings	11
(b) The proceedings below	12
(c) Present status of proceedings	14
Specification of errors to be urged	15
Summary of argument	15
Argument	23
I. The court below should have abstained from exercising its equitable powers to enjoin the holding of the hearing	26
A. The action of the court below prematurely interfered with the orderly utilization and exhaustion of the administrative procedures and remedies	28
B. The court below also erred in finding that appellee had made a showing of irreparable injury warranting the enjoining of a hearing	32
II. Section 405 (b) of the Defense Production Act provides for administrative determination as to the existence of violations of wage stabilization orders and administrative certification of appropriate disallowances	41
A. The legislative history of Section 405 (b) plainly shows that Congress intended administrative enforcement of the Wage Stabilization Program	43

289139—54——1

Argument—Continued Page

II. Section 405 (b) of the Defense Production Act—Continued

A. The legislative history of Section 405 (b)—Continued

1. Section 405 (b) is substantially identical with a provision in the World War II stabilization legislation which Congress knew had been administratively enforced 43

2. Legislative events, since the enactment of Section 405 (b), fully demonstrate congressional awareness and approval of the enforcement program utilized under its provisions 49

B. There is no validity to attempted constructions of Section 405 (b) designed to prevent administrative hearings and enforcement 57

III. The termination of the period of wage stabilization control did not affect the power to conduct and complete enforcement proceedings with regard to violations occurring during the control period 64

A. The General Savings Statute 67

B. There is no express declaration by Congress that wage stabilization enforcement proceedings were to lapse with the termination of the substantive control program, nor is there any basis from which such purpose should reasonably be inferred 70

Conclusion 77

Appendix:

1. Emergency Price Control Act of 1942, 56 Stat. 23 78

2. Defense Production Act of September 8, 1950, 64 Stat. 798, as amended 79

3. Regulations of October 27, 1942 (7 F. R. 8748) 87

4. Economic Stabilization Agency General Order No. 15, 17 F. R. 2994, as amended, 17 F. R. 9997 89

5. Economic Stabilization Agency General Order No. 18, 17 F. R. 6925, as amended, 17 F. R. 9997 94

6. Wage Stabilization Board General Procedural Regulation of September 20, 1951, 16 F. R. 10018, as revised, 17 F. R. 7737 97

CITATIONS

Cases:

Aircraft & Diesel Corp. v. *Hirsch*, 331 U. S. 752 17, 27, 28, 35, 37

Arrow Distilleries v. *Alexander*, 24 F. Suppl 880 36

Blackmar v. *Guerre*, 342 U. S. 512 32

Bourjois, Inc. v. *Chapman*, 301 U. S. 183 29

Bowen v. *United States*, 171 F. 2d 533 67

Bradley Lumber Co. v. *National Labor Relations Board*, 84 F. 2d 97 34

BLEED THROUGH

BLURRED COPY

Cases—Continued

	Page
Brooks v. *Dewar*, 313 U. S. 354	57
Carson Park Builders v. *Allen* (S. D. Cal., Civil No. 15473-WM)	65
Chicago & Southern Air Lines v. *Waterman Corp.*, 333 U. S. 103	29, 30, 31
Commissioner v. *Flowers*, 326 U. S. 465	48, 49
Commissioner v. *Heininger*, 320 U. S. 467	48
Commissioner of Internal Revenue v. *Weisman*, 197 F. 2d 221	50
De La Rama S. S. Co. v. *United States*, 344 U. S. 386	68, 77
Eastern Coal Corp. v. *National Labor Relations Board*, 176 F. 2d 131	68
Employers Group v. *National War Labor Board*, 143 F. 2d 145	31
Fahey v. *Mallonee*, 332 U. S. 245	28, 39, 40
Federal Power Commission v. *Arkansas Power & Light Co.*, 330 U. S. 802	27
Federal Power Commission v. *Metropolitan Edison Co.*, 304 U. S. 375	27
Federal Reserve System, Board of Governors of the v. *Agnew*, 329 U. S. 441	39
Fleming v. *Mohawk Co.*, 331 U. S. 111	57, 67, 69, 77
Goldsmith v. *Board of Tax Appeals*, 270 U. S. 117	28
Gorham Manufacturing Co. v. *State Tax Commission*, 266 U. S. 265	27
Grand Central Aircraft v. *Jones*, 24 CCH Labor Law Reporter No. 67832	26, 65
Hecht v. *Malley*, 265 U. S. 114	48, 49
Hedin Construction Co., In re, Bureau of National Affairs, Labor Relations Reporter, Wage and Salary Controls Binder 7, WHM 100:1153	7
Helvering v. *Winmill*, 305 U. S. 79	48, 49
Hofferbert v. *Anderson Oldsmobile Inc.*, 197 F. 2d 504	49
Jonco Aircraft Corp. v. *Franklin*, 114 F. Supp. 392, reversed *sub nom. Franklin* v. *Jonco Aircraft Corp.*, 346 U. S. 868	25, 27
Lawrence v. *St. L.-S. F. Ry.*, 274 U. S. 588	27
Macauley v. *Waterman Steamship Corp.*, 327 U. S. 540	27
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41	17, 27, 34
N. A. Woodworth Co. v. *Kavanagh*, 102 F. Supp. 9, affirmed, 202 F. 2d 154	43, 49
National Labor Relations Board v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571, certiorari denied, 335 U. S. 908	68
National Labor Relations Board v. *Gate City Cotton Mills*, 167 F. 2d 647	68
National Labor Relations Board v. *National Garment Co.*, 166 F. 2d 233, certiorari denied, 334 U. S. 845	68
National War Labor Board v. *Montgomery Ward & Co.*, 114 F. 2d 528	31

Cases—Continued

	Page
Ng Fung Ho v. *White*, 259 U. S. 276	39
Norback et al. v. *Grand Central Aircraft Co.*, 345 U. S. 988	13
Norwegian Nitrogen Co. v. *United States*, 288 U. S. 294	48, 49, 57
Pennsylvania R. Co. v. *Labor Board*, 261 U. S. 72	31, 36
Petroleum Exploration, Inc. v. *Public Service Commission*, 304 U. S. 209	34
Public Service Commission of Utah v. *Wycoff Company, Inc.*, 344 U. S. 237	27
Public Utilities Commission of California v. *United Air Lines*, 346 U. S. 402	27
Red River Broadcasting Co. v. *Federal Communications Commission*, 98 F. 2d 282, certiorari denied, 305 U. S. 625	28
Rochester Telephone Corp. v. *United States*, 307 U. S. 125	29
Securities & Exchange Commission v. *Otis & Co.*, 338 U. S. 843	27
Shapiro v. *United States*, 335 U. S. 1	48, 49
Sierra Drawn Steel Corp. v. *Gregory*, 115 F. Supp. 545	27, 65
Stark v. *Wickard*, 321 U. S. 288	39
Superlite Materials Co., Bureau of National Affairs, Labor Relations Reporter, Wage and Salary Controls Binder 7, WHM 100 : 1200x	7
Switchmen's Union v. *National Mediation Board*, 320 U. S. 297	40
Textile Mills Corp. v. *Commissioner*, 314 U. S. 326	58
Tool, Die and Gage Shop, In re, Bureau of National Affairs, Labor Relations Reporter, Wage and Salary Controls Binder 7, WHM 100 : 1200z19	7, 8
Troy Laundry Co. v. *Wirtz*, 155 F. 2d 53, certiorari denied, 329 U. S. 723	49
Twentieth Century Air Lines v. *Ryan*, 98 L. Ed. (Adv. pp. 29, 32)	28, 36
United States v. *Allied Oil Corp.*, 341 U. S. 1	67, 77
United States v. *Carter*, 171 F. 2d 530	67
United States v. *Fortier*, 342 U. S. 160	67
United States v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299	17, 29, 30, 31, 35, 36
United States v. *Morgan*, 307 U. S. 183	26
Utah Fuel Co. v. *National Bituminous Coal Commission*, 306 U. S. 56	28
Weather-Seal Mfg. Co. v. *Commissioner of Internal Revenue*, 16 T. C. 1312, affirmed, 199 F. 2d 376	49
White v. *Johnson*, 282 U. S. 367	27
Constitution, Statutes, Executive Orders, and Regulations:	
U. S. Constitution, Judiciary Article	31
Act of June 30, 1944, 58 Stat. 632	48
Act of June 30, 1945, 59 Stat. 306	48
Act of July 25, 1946, 60 Stat. 664	48

BLEED THROUGH

BLURRED COPY

Constitution, etc.—Continued Page
Administrative Procedure Act, Sec. 10 (c), 60 Stat. 237, 243, 5 U. S. C. 1009 ---- 28, 39
Defense Production Act of 1950, as amended:
Title IV ---- 2, 44, 61, 65, 69, 70
Sec. 403 ---- 3
Sec. 403 (b)-(d) ---- 5
Sec. 405 ---- 14, 64
Sec. 405 (a) ---- 50, 62, 63
Sec. 405 (b) ---- 3, 4, 5, 14, 15, 18, 19, 20, 23, 24, 39, 41, 43, 44, 45, 49, 52, 58, 60, 61 62, 63, 72, 73
Sec. 409 ---- 3, 61, 63
Sec. 409 (a) ---- 61
Sec. 409 (b) ---- 61
Sec. 409 (c) ---- 61
Sec. 409 (d) ---- 50, 63
Title VII ---- 11
Sec. 703 ---- 3, 69, 76
Sec. 703 (a) ---- 42
Sec. 705 ---- 76
Sec. 706 ---- 60
Sec. 706 (a) ---- 61
Sec. 706 (b) ---- 60, 61, 71, 72, 73
Sec. 712 ---- 50
Sec. 717 (a) ---- 10, 70, 77
Sec. 717 (b) (3) ---- 10, 70, 74
Defense Production Act Amendments of 1952, 66 Stat. 296 ---- 52, 64
Emergency Price Control Act of 1942, 56 Stat. 23:
Sec. 1 (b) ---- 72, 73
Sec. 205 ---- 60, 61
Sec. 205 (a) ---- 60, 61
Sec. 205 (b) ---- 60, 61
Sec. 205 (c) ---- 61
General Savings Statute, 1 U. S. C. (Supp. V) 109 ---- 21, 23, 66, 67, 70, 71, 73, 77
Stabilization Act of 1942, Sec. 5, 56 Stat. 767, 50 U. S. C. App. 965 ---- 18, 19, 23, 41, 44, 45, 48, 49, 60, 62, 72, 73
Supplemental Appropriations Act of 1954, 67 Stat. 418 ---- 52
26 U. S. C.:
272 ---- 39
322 ---- 39
3772 ---- 39
28 U. S. C. 2282 ---- 13
Executive Order No. 9250 of October 3, 1942, 7 F. R. 7871 ---- 45
Executive Order No. 9801 of November 9, 1946, 11 F. R. 13435 ---- 72
Executive Order No. 9809 of December 12, 1946, 11 F. R. 14281 ---- 75
Sec. 10 (b) ---- 72

Constitution, etc.—Continued
Page
Executive Order No. 10161 of September 9, 1950, 15 F. R. 6105 ---- 3
Executive Order No. 10434 of February 6, 1953, 18 F. R. 809 ---- 10, 64
Executive Order No. 10494 of October 14, 1953, 18 F. R. 6585 ---- 10, 11, 22, 69, 77
Economic Stabilization Agency General Order No. 3, 16 F. R. 739 ---- 4
Economic Stabilization Agency General Order No. 15, 17 F. R. 2994, as amended November 4, 1952, 17 F. R. 9977 ----
Sec. 3 ---- 5, 11, 52
Sec. 4 (a) ---- 6
Sec. 4 (b) ---- 6
Sec. 6 ---- 6
Economic Stabilization Agency General Order No. 18, 17 F. R. 6925, as amended November 4, 1952, 17 F. R. 9977 ---- 8, 39
Sec. 4 (a) ---- 5, 11
Sec. 4 (b) ---- 5
Sec. 5 ---- 5
General Ceiling Price Regulation of January 26, 1951, 16 F. R. 808 ---- 5
National War Labor Board Regulation of July 30, 1943, 9 F. R. 4681 ---- 4
Order of Defense Mobilization Director dated November 1, 1953, 18 F. R. 6966 ---- 46
Regulations of October 27, 1942, 7 F. R. 8748: ---- 11
Sec. 4001.2 ---- 45
Sec. 4001.10 ---- 45
Sec. 4001.16 ---- 45
Amendments to Regulations of October 27, 1942, 8 F. R. 11960; 9 F. R. 14547; 10 F. R. 9628, 14820 ---- 45
Wage Stabilization Board Enforcement Regulation No. 1, 16 F. R. 6028 ---- 4
Wage Stabilization Board General Regulation 1, 16 F. R. 816 ---- 11
Wage Stabilization Board General Procedural Regulation No. 1 of September 20, 1951, 16 F. R. 10018, revised August 21, 1952, 17 F. R. 7737 ----
Sec. 2.1 ---- 5, 8, 11
Sec. 2.1–2.7 ---- 11
Sec. 2.3 ---- 9
Sec. 2.7 ---- 12, 30
Sec. 3.1 ---- 9
Sec. 3.2 ---- 9
Sec. 4 ---- 9
Sec. 4.1 ---- 30
9, 30

BLEED THROUGH

BLURRED COPY

Constitution, etc.—Continued
Page
Wage Stabilization Board General Procedural Regulation No. 1 of September 20, 1951, etc.—Continued
Sec. 4.1 (e) 30
Sec. 4.1 (f) 9
Sec. 5.1 30
Sec. 5.2 9, 30
Sec. 5.2 (c) 9
Sec. 6.1 10, 30
Sec. 8.1 10
Wage Stabilization Board Resolution of June 28, 1951, 16 F. R. 7284 4, 5
Miscellaneous:
Annual Report of the Commissioner of Internal Revenue, 1947, pp. 62–63 49, 72
Annual Report of the Commissioner of Internal Revenue, 1948, pp. 33–34 48, 49, 72
Annual Report of the Commissioner of Internal Revenue, 1949, pp. 26–27 48, 49, 72
96 Cong. Rec.:
11631 44
11867 44
97 Cong. Rec. 8555 50
99 Cong. Rec. (Daily Ed., July 30, 1953) 10705 56
First Annual Report of the Joint Committee on Defense Production, S. Rept. 1040, 82d Cong., 1st Sess., p. 101 51
H. Doc. 176, 83d Cong., 1st Sess., p. 5 52
H. Rept. 639, 82d Cong., 1st Sess., p. 40 50, 63
H. (Conference) Rept. No. 1090, 83d Cong., 1st Sess., p. 5, Amendments Nos. 76, 77 52, 57
Hearings before the Subcommittee of the House Committee on Appropriations, 78th Cong., 1st Sess., on the National War Agencies Appropriation Bill for 1944, Part 2, pp. 667–668 46
Hearings before the Subcommittee of the House Committee on Appropriations, 78th Cong., 1st Sess., on the National War Agencies Appropriation Bill for 1945, Part 1:
pp. 240–241 47
pp. 303–304 47
Hearings before the Subcommittee of the House Committee on Appropriations, 79th Cong., 1st Sess., on the National War Agencies Appropriations Bill for 1946, pp. 12–13 47
Hearings before the Committee on Banking and Currency, House of Representatives, 82d Cong., 1st Sess., on H. R. 3871 (Defense Production Act Amendments of 1951):
p. 653 62, 63
pp. 653–654 64
Hearings before the Committee on Appropriations, United States Senate, 83d Cong., 1st Sess., on H. R. 6200:
p. 377 54

Miscellaneous—Continued
Page
Hearings before the Committee on Appropriations, etc.—Continued
pp. 423–431 — 54
pp. 423–437 — 53
p. 424 — 54
pp. 426–427 — 54
p. 427 — 55
p. 428 — 55
pp. 428–431 — 55
p. 429 — 55, 56
p. 431 — 56, 76
Hearings before the Subcommittee on Appropriations, House of Representatives, 83d Cong., 1st Sess., on H. R. 6200:
pp. 439–441 — 53
p. 441 — 54
Letter of Deputy Attorney General Peyton Ford to Chairman of House Committee on Banking and Currency dated June 4, 1951, Hearings before the Committee on Banking and Currency, House of Representatives, 82d Cong., 1st Sess., on H. R. 3871 (Defense Production Act Amendments of 1951), pp. 652, 653 — 50
Letter of President of January 26, 1951, 16 F. R. 793 — 4
National Wage Stabilization Board, The, January 1, 1946 to February 24, 1947:
pp. 223–235 — 49
p. 230 — 48
Second Annual Report of the Joint Committee on Defense Production, October, 1952 — 20, 52
Sen. Rept. No. 2250, 81st Cong., 2d Sess.:
pp. 4–5 — 43
pp. 20–21 — 44
pp. 20–29 — 44
p. 39 — 45
Sen. Rept. 3, 83d Cong., 1st Sess., pp. 112–113 — 52
Sen. Rept. No. 677, 83d Cong., 1st Sess., p. 17 — 56
Termination Report of the National War Labor Board, Vol. I:
pp. 428–441 — 48
pp. 437–441 — 48
Wage Stabilization Board, Enforcement Decisions Under Wage Controls, Bureau of National Affairs, Labor Relations Reporter, Wage and Salary Controls Binder 7, 100: 1151–1200x 52 — 53

BLEED THROUGH

BLURRED COPY

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 450

ARTHUR P. ALLEN, CHAIRMAN, TWELFTH REGION WAGE STABILIZATION BOARD, ET AL., APPELLANTS

v.

GRAND CENTRAL AIRCRAFT CO., A CALIFORNIA CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the three-judge United States District Court for the Northern District of California, Southern Division (R. 33–36), is reported at 114 F. Supp. 389.

JURISDICTION

The judgment of the three-judge district court, especially convened pursuant to 28 U. S. C. 2282, was entered on July 31, 1953 (R. 31–32). The petition for appeal was presented to (R. 38), and allowed by, Goodman, D. J., on September 24, 1953 (R. 39). This Court noted probable jurisdiction on January 4, 1954 (R. 41). The jurisdiction of this Court rests on 28 U. S. C. 1253.

QUESTIONS PRESENTED

1. Whether appellee was entitled to enjoin the administrative proceeding before the National Enforcement Commission, prior to the holding of the initial hearing, in order to avoid irreparable injury.

2. Whether Section 405 (b) of the Defense Production Act of 1950 authorizes an administrative enforcement procedure for the disallowance, for income tax computation and other purposes, of wages paid by an employer in excess of applicable wage ceilings.

3. Whether the expiration of Title IV of the Defense Production Act bars the continuation of administrative proceedings for the determination of liabilities for violation of the wage stabilization provisions prior to their expiration.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Stabilization Act of 1942, of the Defense Production Act of 1950 as amended and of the Regulations issued thereunder are set forth in the Appendix, *infra,* pp. 78–103. The statutory scheme and the more pertinent provisions are described at the beginning of the Statement immediately below.

STATEMENT

1. THE LEGISLATIVE AND REGULATORY BACKGROUND

(a) *The Defense Production Act.* Title IV of the Defense Production Act of 1950, approved on September 8, 1950 (64 Stat. 798, 50 U. S. C. App.

BLEED THROUGH

BLURRED COPY

(Supp. V), 2061 *ff.*) gave the President stand-by authority to stabilize prices and wages. The principal method utilized to enforce the wage control provisions of the Act was contained in Section 405 (b):[1]

> (b) No employer shall pay, and no employee shall receive, any wage, salary, or other compensation in contravention of any regulation or order promulgated by the President under this title. The President shall also prescribe the extent to which any wage, salary, or compensation payment made in contravention of any such regulation or order shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation.

(b) *The Regulations issued under the Defense Production Act.* By Executive Order No. 10161 of September 9, 1950 (15 F. R. 6105), the President created the Economic Stabilization Agency, headed by an Economic Stabilization Administrator, as a "new and independent agency"[2] and delegated to him his functions under Title IV of the Defense Production Act (Price and Wage Stabilization); the Order also established within the Agency a tripartite Wage Stabilization Board composed of

[1] Section 409 provided injunctive relief and criminal sanctions.

[2] Cf. Section 403 of the Defense Production Act. Section 703 gave the power to delegate his functions under the Act and to authorize the redelegation of the functions so conferred.

nine members. On January 24, 1951, the Economic Stabilization Administrator redelegated his authority to enforce wage stabilization to the Wage Stabilization Board (Economic Stabilization Agency, General Order No. 3, 16 F. R. 739).

Two days later, on January 26, 1951, the President exercised the stand-by power conferred upon him to stabilize prices and wages.[3] Price control was imposed by the General Ceiling Price Regulation of January 26, 1951, issued by the Director of Price Stabilization (16 F. R. 808). On the same day the Economic Stabilization Administrator issued General Wage Stabilization Regulation No. 1 (16 F. R. 816), which froze wages as of January 25, 1951. The Wage Stabilization Board immediately exercised its substantive control powers. Several months, however, passed before the Board began to carry out its enforcement functions. On June 13, 1951, it issued Enforcement Regulation No. 1 (16 F. R. 6028), which established a National Enforcement Commission, charged with the enforcement of the Wage Stabilization Program, including the determination of and certification to other agencies of such wage payments as were to be disregarded under Section 405 (b). A resolution of the Wage Stabilization Board dated June 28, 1951 (16 F. R. 7284), set forth in detail the procedure before the National Enforcement Commission and the considerations which were to determine the amount of the dis-

[3] Letter of the President of January 26, 1951, 16 F. R. 793.

BLEED THROUGH

BLURRED COPY

allowances under Section 405 (b).[4] These orders were the forerunners of the regulations controlling the proceedings in the instant case which are described in detail below.

On July 28, 1952, the Economic Stabilization Administrator issued his General Order No. 18 (17 F. R. 6925, Appendix, *infra*, pp. 94–97)[5] pursuant to which the National Enforcement Commission was transferred from the Wage Stabilization Board[6] to its parent agency, the Economic Stabilization Agency, and charged not only as heretofore with the enforcement of wage stabilization, but also with the enforcement of stabilization of salaries and of railroad and airline wages (Section 4 (a)). Section 5 expressly redelegated to the National Enforcement Commission the authority to impose disallowance sanctions under Section 405 (b) of the Act. Pursuant to Section 4 (b) of General Order No. 18, the Commission was to be guided by the policy and procedure set forth in Economic Stabilization Agency General Order No. 15 of April 3, 1952 (17 F. R. 2994).

General Order No. 15 (17 F. R. 2994, as amended November 4, 1952, 17 F. R. 9977, Appen-

[4] The pertinent provisions of the Resolution of June 28, 1951, were reissued in the Wage Stabilization Board's General Wage Procedural Regulation of September 20, 1951 (16 F. R. 10018).

[5] See also General Order No. 18, Amendment 1, of November 4, 1952 (17 F. R. 9977).

[6] The Wage Stabilization Board had been placed on a statutory basis by the Defense Production Act Amendment of 1952, Section 403 (b)–(d) as amended.

dix, *infra*, pp. 89–93) dealt primarily with the substance of the enforcement proceedings. Section 3 (*infra*, p. 90) gave the National Enforcement Commission authority to determine whether any wages had been paid in violation of the Act and to determine the amount of payments to be disallowed pursuant to Section 405 (b).

Section 4 (a) (*infra*, p. 91) provided that wage payments made in violation of the Act could be disallowed for the purposes of:

> (1) calculating deductions for the purpose of determining gain under the revenue laws;
>
> (2) determining costs and expenses under government contracts;
>
> (3) establishing maximum prices;
>
> (4) generally, the determination of costs and expenses for the purposes of other laws or regulations.

Section 4 (b) (*infra*, pp. 91–92) formulated the standards which were to be followed in determining the amount of the disallowance. While the entire amount of the illegal payroll could be disallowed, the Commission was authorized to determine a lesser amount, usually related to the illegal excess, in the presence of mitigating circumstances such as:

> (1) prompt and voluntary disclosure;
>
> (2) prompt and full cooperation;
>
> (3) prompt remedying of the violation;
>
> (4) adoption of prompt and adequate measures to prevent repetition;

BLEED THROUGH

BLURRED COPY

(5) inadvertency of violation;
(6) other circumstances.

The actual practice discloses that in almost every case the Commission exercised its power to take mitigating circumstances into account. The disallowance of the entire unauthorized payroll was the rare exception, and the usual sanction imposed amounted to the excessive wage payments.[7] Sec-

[7] We have been advised by the Office of Defense Mobilization that the National Enforcement Commission issued 132 written opinions disposing of 166 cases. In 9 instances the complaint was dismissed; 46 involved the disposition of stipulations for the entry of disallowances upon consent. In the remaining 111 cases the disallowance equalled the excess payments in 61 instances. It was less than the excess in 32 cases. In 18 cases, more than the excess payments was disallowed. In 16 of these cases, the disallowance was geared to the excess payments and amounted to:

Four times the excess in	1 case
Three times the excess in	1 case
Twice the excess in	8 cases
One and one-half times the excess in	1 case
1⅒ the excess in	1 case
	12 cases

In three cases the disallowance amounted to the excess payment for a part of the period and twice the excess for the remainder; in one instance the order provided for the disallowance of the excess for one part of the period and three times for the remaining—considerably shorter—period of the violation (*Superlite Materials Co.*, Bureau of National Affairs, Labor Relations Reporter, Wage and Salary Controls, Binder 7, WHM 100:1200x).

The disallowance was measured by the illegal payroll only in the two remaining cases: *In re Hedin Construction Co.*, Bureau of National Affairs, Labor Relations Reporter, Wage and Salary Controls, Binder 7, WHM 100:1153, and *In re Tool, Die and Gage Shop*, *ibid.*, WHM 100:1200z 19.

tion 6 (*infra,* p. 93) dealt with the effect of a determination of the Commission and provided that:

> [a]ny such determination shall be conclusive on all Executive Departments and agencies of the Government, and they shall disregard and disallow the amounts thus certified. Any determination made pursuant to this authority under the Defense Production Act, as amended, shall be final and not subject to review by The Tax Court of the United States or by any court in any civil proceeding.

The procedure to be followed by the Commission was carefully set forth in the Revised General Procedural Regulation No. 1 of August 21, 1952 (17 F. R. 7737, Appendix, *infra,* pp. 97–103). Under this regulation, an enforcement proceeding required a complaint by the prosecuting agency, the right to answer and make appropriate motions, appearance through counsel on the part of respondent, and a hearing, of which an official transcript was made, with the right to examine and cross-examine witnesses. Sections 2.1–2.7. Provisions were made

---

In the former case the Commission disallowed the excess payments for approximately one half of the period involved and one half of the illegal payroll for the remainder. In the latter case in which the Commission found "a deliberate and intentional violation after being expressly informed of his obligations under the law" (*ibid.* at 100:1200z 21) it disallowed the entire payroll amounting to $3,082.27 over a period of about five weeks.

The decisions of the National Enforcement Commission, although not officially "reported", were publicly and widely distributed, and many of them can be found in Bureau of National Affairs, Labor Relations Reporter, referred to above.

BLEED THROUGH

BLURRED COPY

for stipulation of facts, the issuance of subpoenas, and the presence of intervenors. Sections 2.7, 3.1, 3.2 The hearings were to be conducted regionally by a designated Enforcement Commissioner to whom proposed findings, recommendations, and briefs could be submitted. Section 4.1. The Enforcement Commissioner was required to follow and apply the standards of General Order 15, *supra,* and to make his findings and determinations in writing, together with a recommendation as to the appropriate amount of disallowance, if any. Section 4.1. The Enforcement Commissioner was further required to file his findings and determinations with the National Enforcement Commission and to serve copies on the parties. Section 4.1. Equally elaborate provisions were set forth with regard to appeals to the National Enforcement Commission. Section 5.1. If no appeal were taken, the findings and recommendation of the Enforcement Commissioner, in the absence of clear error, were to be adopted by the Commission. Section 4.1 (f). If an appeal were taken, the Commission, on the whole record, was empowered to affirm, modify, or reverse the Enforcement Commissioner, to remand the case for further hearing, or to dismiss the complaint. Section 5.2. The findings and determinations of the National Enforcement Commission were to be final. Section 5.2 (c). Based on final disposition of the matter or upon stipulation, the National Enforcement Commission was authorized to issue a Certificate of Dis-

289139—54——2

allowance, fixing the amount to the disregarded by reason of the wage or salary violations. Sections 6.1, 8.1.[8]

(c) *The deactivation of the Wage Stabilization Program.* Executive Order 10434 of February 6, 1953 (18 F. R. 809) suspended the wage and salary stabilization program of the Defense Production Act, but provided that this suspension was not to—

> operate to defeat any suit, action, prosecution, or administrative proceeding, whether heretofore or hereafter commenced, with respect to any right, liability, or offense possessed, incurred, or committed prior to this date.

Pursuant to Section 717 (a) of the Act (*infra*, p. 86), Title IV and all authority conferred thereunder terminated on April 30, 1953. Subsection (b) (3) of Section 717, however, provided that:

> Any agency created under this Act may be continued in existence for purposes of liquidation for not to exceed six months after the termination of the provision authorizing the creation of such agency.

Executive Order No. 10494 of October 14, 1953 (18 F. R. 6585), delegated, effective November 1, 1953, the function

> of conducting administrative proceedings under Title IV of the Act, including the conclusion of those instituted pursuant to section 405 * * * to the Director of the Office of Defense Mobilization.

---

[8] As we shall show, *infra*, pp. 45–49, these regulations substantially followed the administrative practice established under World War II wage control.

BLEED THROUGH

BLURRED COPY

Certain of the powers created by Title VII of the Defense Production Act, which do not expire until June 30, 1955, are exercised by the Office of Defense Mobilization. Section 717 (a), *infra*, p. 86. The Director of Defense Mobilization by his Order dated November 1, 1953 (18 F. R. 6966) authorized the Assistant Director of the Office of Defense Mobilization to carry out the functions delegated by Executive Order No. 10494. The November 1, 1953, Orders adopted and incorporated General Orders Nos. 15 and 18 (*supra*, pp. 5–8) as amended, and Economic Stabilization Agency General Procedural Regulation 1 Revised (*supra*, pp. 8–10).

2. THE CONTROVERSY HERE INVOLVED

(a) *The administrative proceedings.* Appellee Grand Central Aircraft Co. is a California corporation, doing business in Glendale, California, and Tucson, Arizona. It is engaged in the production and repair of aircraft equipment (R. 2; Complaint, par. II). On November 4, 1952, the Wage Stabilization Board, pursuant to General Procedural Regulation 1 (Revised) (hereafter referred to as GPR 1), Section 2.1 (17 F. R. 7737, 7738) filed a complaint with the National Enforcement Commission alleging in substance that appellee had granted wage increases in 1951 in violation of General Wage Stabilization Regulation 1[9] (R. 8–10; Exhibit to Complaint and

[9] 16 F. R. 816; cf. *supra*, p. 4.

par. 9 of Complaint). On January 14, 1953, appellant Phil C. Neal was appointed Enforcement Commissioner by the National Enforcement Commission pursuant to GPR 1, Section 2.3 (Appendix, *infra,* p. 98) for the purpose of taking evidence (R. 4; Complaint, par. X). On February 11, 1953, Neal set the case down for a hearing on February 24, 1953 (R. 4; Complaint, par. X).

(b) *The proceedings below.* On February 13, 1953, respondent instituted the instant proceedings by filing a complaint in the United States District Court for the Northern District of California, Southern Division, to restrain, among others, the members of the Wage Stabilization Board, the National Enforcement Commission, officials of the Twelfth Region Wage Stabilization Board, and the Enforcement Commissioner from proceeding with the administrative hearing (R. 1–8).[10] The complaint denied that Grand Central had violated the Defense Production Act or any regulative order issued thereunder (R. 7; Complaint, par. XV) and alleged in substance that the Defense Production Act was unconstitutional, that the regulations

[10] The members of the Wage Stabilization Board of the National Enforcement Commission, and other defendants whose official station was in Washington never were served with process. The complaint alleges that the members of the Twelfth Region Wage Stabilization Board and their counsel were threatening to prosecute the complaint before the National Enforcement Commission (R. 4). Apart from the Enforcement Commissioner designated to hold hearings, none of the defendants is any longer employed by the Government.

BLEED THROUGH

BLURRED COPY

issued thereunder were in conflict with the statutory requirements, and that the holding of the hearing would inflict irreparable damage upon Grand Central.

The hearing before the Enforcement Commissioner was thereupon postponed to abide the outcome of the judicial proceedings. A three-judge court appointed on March 11, 1953, pursuant to 28 U. S. C. 2282, issued a temporary restraining order on March 20, 1953, against Enforcement Commissioner Neal and the members and officials of the Twelfth Region Wage Stabilization Board who were within the jurisdiction of the Board (R. 15–16).[11] On May 28, 1953, the court issued an interlocutory injunction against the same officials (R. 19–20).[12]

On July 24, 1953, a hearing was held before the three-judge court (R. 42–79), and evidence was introduced by appellee to support its allegations of

[11] On April 3, 1953, the defendant officials moved to vacate the temporary restraining order, pointing out that appellee could suffer irreparable injury only if the administrative hearing culminated in issuance of a disallowance certificate. The motion to vacate also stated that if the administrative proceeding before the Enforcement Commissioner was allowed to continue, no certificate of disallowance would be issued by the National Enforcement Commission until two weeks after the Commission's final decision, which would have enabled appellee, during that two-week period, to seek any judicial remedies it might then desire. The district court denied the motion on May 11, 1953. (R. 16, 17.)

[12] On June 15, 1953, this Court denied an application for a stay of the interlocutory injunction filed by the defendants Norback and Neal, *sub nom. Norback et al.* v. *Grand Central Aircraft Co.*, 345 U. S. 988. The late Chief Justice and Mr. Justice Burton dissented.

irreparable injury. On July 31, 1953, the court entered its opinion and findings of fact (R. 33–37). The court found (a) that the continuance of the administrative proceeding would cause irreparable damages to Grand Central because it would result in the withdrawal of bank credits and ultimately in bankruptcy, and (b) that Section 405 (b) of the Act merely authorized the President to prescribe the *extent* to which unauthorized payments were to be disregarded, but not to establish an administrative method of enforcement (R. 33–37). A judgment permanently enjoining the officials of the Twelfth Region Wage Stabilization Board and the appellant Neal, Enforcement Commissioner, from prosecuting, hearing any charges, or otherwise proceeding against appellee was entered on July 31, 1953 (R. 31–32).

(c) *Present status of proceedings.* As pointed out above (*supra,* pp. 10–11), the function of concluding administrative proceedings instituted under Section 405 of the Defense Production Act has been delegated by the President to the Director of the Office of Defense Mobilization, who in turn redelegated it to his Assistant Director. The remaining appellant, Enforcement Commissioner Phil C. Neal, is on the staff of the Office of Defense Mobilization and ready to conduct the hearing if the injunction is lifted.

BLEED THROUGH

BLURRED COPY

SPECIFICATION OF ERRORS TO BE URGED

The district court erred:

1. In holding that the enforcement hearings would inflict irreparable injury upon appellee.

2. In holding that appellee did not have to exhaust the administrative process before seeking judicial relief.

3. In holding that Section 405 (b) of the Defense Production Act does not permit administrative means of enforcement.

4. In entering judgment for appellee.

SUMMARY OF ARGUMENT

I

In this case, a statutory three-judge court enjoined the holding of a hearing by a local Enforcement Commissioner, scheduled in accordance with the administrative procedure established by regulations issued pursuant to Section 405 (b) of the Defense Production Act of 1950. The purpose of the hearing thus enjoined was to inquire whether appellee had violated wage stabilization regulations during 1951 and, if so, to recommend an appropriate tax disallowance. The local Enforcement Commissioner's finding both with regard to the existence of violations and the appropriate amount of disallowance were purely recommendatory. If violations were found, an employer such as appellee, had a right to appeal to the National Enforcement Commis-

sion in Washington. If the finding of violation was sustained and an appropriate disallowance ascertained after final hearing, a certification would be issued to the Commissioner of Internal Revenue who would impose an appropriate deduction.

(a) First, the court below should have recognized the plain applicability of the rule requiring appellee to exhaust its administrative remedy. The well established principle, and the reasons which support it, should itself have been taken sufficient to reject appellee's request for equitable intervention. The regional hearing, if held, might have resulted in a finding that no violation had occurred or that no disallowance was warranted. The same result might have obtained after hearing, on appeal, before the National Enforcement Commission.

Appellee's request for an injunction should also have been rejected by reference to the rule precluding judicial review of administrative action until that action has reached the point where it exerts compulsive effect. Here, no actual compulsive action would have been taken until, after complete utilization of administrative machinery, a tax disallowance was imposed by the Commissioner of Internal Revenue. The remaining defendant in this case, the hearing officer, could only have filed a report and recommendation with the Commission in Washington.

BLEED THROUGH

BLURRED COPY

(b) Nor did appellee prove the kind of "injury" which is sufficient to make the doctrine of exhaustion of remedies inapplicable. Contentions with regard to the expense and inconvenience of scheduled proceedings have frequently been put forward and just as frequently rejected. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. And the same is true as to claims of injury resulting from the threatened impairment of credit and interference with contractual relations with third parties. *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752; *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299. It has been held that such inconveniences constitute an unavoidable part of the social burden of living under government and constitute no basis for avoiding an administrative proceeding or a trial.

The court below should also have rejected appellee's further claim with regard to irreparable injury, namely, that it would be unable to obtain judicial review after the termination of the administrative proceeding. Clearly, after the imposition of a certified tax disallowance by the Commissioner of Internal Revenue, the usual remedies of the taxpayer would be available. The nature and scope of such review would be determined at that stage of the proceeding; it should be sufficient for present purposes that at that time appellee could obtain the review to which it was legally entitled.

II

Assuming that any proper occasion was presented in this case for resolving appellee's contention as to statutory interpretation, we submit that the court below plainly erred in limiting wage stabilization enforcement to district court proceedings. The language of Section 405 (b), the crucial statutory provision, contains no indication that wage stabilization enforcement is so limited. The language of this section permits the use of an administrative hearing procedure to inquire into violations, and the imposition of an administrative disallowance sanction where violations have been found to exist. The correctness of this interpretation is proved beyond doubt by a consideration of the history of the provision.

(a) Section 405 (b) was specifically derived from, and substantially identical with, Section 5 of the Stabilization Act of 1942. Wage stabilization enforcement under the 1942 legislation, with the knowledge and approval of Congress, was achieved by administrative proceedings and disallowance substantially the same as those utilized under the 1950 Act. The matter came to the specific attention of Congress on many occasions, and was accepted as proper enforcement from the outset of the wage stabilization program in 1942 until the final termination of the enforcement proceedings in 1949. During that period,

BLEED THROUGH

BLURRED COPY

nearly 100,000 proceedings took place and disallowances totaling nearly $30,000,000 were made.

When, after an extremely short interval, Congress was again obliged to enact emergency control legislation to meet the needs of the period of hostilities in Korea, the language and experience of the 1942 emergency legislation were consciously utilized. The administrative disallowance sanction of Section 405 (b) was specifically taken from Section 5 of the Stabilization Act of 1942 as the most appropriate and effective enforcement procedure against violations of wage stabilization regulations and orders.

This conscious utilization of the enforcement procedure and sanction developed and applied during and after the World War II emergency control period, in itself, indicates beyond question that Congress intended and approved the interpretation of Section 405 (b) which was rejected by the court below. In addition, there is abundant evidence since the enactment of Section 405 (b) to show that Congress was fully aware of the interpretation given that section and the administrative procedure and sanction utilized thereunder.

For example, in 1951, Congress added administrative disallowance as an enforcement method in connection with violation of price regulations, specifically recognizing that, prior to that amendment, administrative enforcement had been available only in connection with wage stabilization

regulations. Again, a report of the Joint Committee on Defense Production, created to study the administration of emergency programs under the 1950 Act and report and recommend to Congress, described, as early as October, 1951, the administrative procedure utilized, stating that "* * * the enforcement commission will sit in a quasi judicial capacity to determine whether there have been violations and what penalties should be invoked. * * *" The Joint Committee's Second Annual Report, submitted in October, 1952, described the whole administrative enforcement procedure under Section 405 (b) in great detail. Indeed, Congress went so far as to appropriate money for the completion of cases such as this over objection by this appellee to the continuation of this very case.

From all of these materials, we think it clear that Congress intended Section 405 (b) to authorize the use of administrative procedures as a technique for the enforcement of wage stabilization regulations and orders entirely separate from enforcement by way of district court proceedings.

III

As the date approached upon which Congress had provided for the termination of the imposition of substantive controls, a number of employers, like appellee herein, sought injunctions against hearings scheduled to consider violations allegedly occurring during the period of control. These injunc-

BLEED THROUGH

BLURRED COPY

tion proceedings have prevented the completion of a number of scheduled hearings.

The power to continue and complete enforcement proceedings with regard to violations allegedly occurring during the substantive control period is not affected by the termination of the substantive control program or by the physical dissolution of the special agency created to administer and correlate that program during its life. On the contrary, the language, policy, and purpose of the General Savings Statute plainly preserves the power to continue and complete enforcement proceedings in the circumstances of this and similar cases.

The applicability of the General Savings Statute (1 U. S. C. (Supp. V) 109) can, of course, be lifted where Congress expressly so declares. Here, however, there is no express direction by Congress which would suffice to cut off enforcement at an incomplete stage. Neither the provision terminating the substantive control program nor the provision allowing six months for liquidation of the specially created agency constitutes such an express declaration. And the specific savings language of the Act, preserving "* * * any suit, action, or prosecution, whether theretofore or thereafter commenced, with respect to any right, liability, or offense incurred or committed prior to the termination date * * *" cannot be read as language expressly designed to wipe out any liabilities created by the Act. In fact, if this provision be read in the light of comparable language used in connection with the World War

II control program, and in the light of the complete liquidation of wage stabilization enforcement under that program, ending in 1949, it would seem plain that Congress must be deemed to have intended that enforcement be completed.

There are thus no indications of an express purpose in Congress to cause a lapse in the power to complete enforcement proceedings. On the contrary, there are clear indications that Congress intended that enforcement be processed to completion. For example, at appropriations hearings held after the termination of the substantive control program, it was assumed by both Houses of Congress that enforcement as to past violations would be continued and completed. The only problem was whether such completion could be achieved prior to the dissolution of the independent agency created to administer controls and the need of funds for that purpose. Again, in connection with the suggestion that the power to enforce lapsed with the physical dissolution of the independent control agency, committees of both Houses indicated, during the appropriations hearings referred to above, that, if enforcement could not be completed by the special agency, it would be completed by some other agency. Specific provisions of the statute require the same conclusion.

The Office of Defense Mobilization, to which the President delegated the completion of the enforcement function, in connection with wages stabilization, by Executive Order 10494, October 14, 1953,

BLEED THROUGH

BLURRED COPY

is not affected by the expiration of Title IV of the Defense Production Act. The President, in whom the basic power to enforce is lodged, possesses broad investigatory powers, continuing for a "period of two years" after the termination of the Act, including all powers necessary to institute administrative hearings. And the President is also given a specific power to delegate the authority conferred upon him.

All of these factors demonstrate that Congress has never intended the lapse of time to excuse violators of the wage stabilization enforcement program, and that the policy embodied in the General Savings Statute was intended to apply to cases such as this.

ARGUMENT

The statutory provisions establishing the pattern of enforcement in the field of wage and salary stabilization during World War II and the recent period of hostilities in Korea, the two periods in which national exigencies have made wage stabilization imperative, are set forth in Section 405 (b) of the Defense Production Act of 1950, as amended,[13] derived from Section 5 of the Stabilization Act of 1942.[14] Both sections condemned the payment of wages and salaries in excess of levels permitted by regulations issued under the substantive control program and au-

[13] 64 Stat. 798, 807, 50 U. S. C. App. (Supp. V) 2105 (b), *infra*, p. 81.

[14] 56 Stat. 767, 50 U. S. C. App. 965, *infra*, p. 44.

thorized the President to prescribe the extent to which wages or salaries so paid were to be disregarded by governmental agencies in determining the violating employer's costs or expenses for the purpose of any law or regulation. Under the statutory enforcement scheme, careful procedures were established. See pp. 6–10, *supra.*

Literally thousands of enforcement cases were processed during the two recent emergency periods under the statutory administrative scheme contained in Section 405 (b). Toward the close of the Korean hostilities period, when the termination of the substantive control program was clearly imminent, employers involved in a number of pending enforcement proceedings sought to prevent the completion of such proceedings. The alleged violations involved in these enforcement proceedings had, of course, accrued during the life of the substantive control program.

This is such a case. Here, the holding of a regional hearing, set down to inquire whether appellee had violated substantive control regulations and, if so, to make appropriate recommendations to the National Enforcement Commission in Washington, was enjoined by a statutory three-judge court. Putting to one side constitutional issues, the court below, conceding the President's statutory authority "* * * to prescribe the *extent* to which any unauthorized payment * * * may be disregarded by the Executive Departments (such as the Treasury) in determining gain for tax pur-

BLEED THROUGH

BLURRED COPY

poses * * *," (R. 36)[15] held that "the statute nowhere vests in the President or in any delegated agency the power to actually impose penalties" (R. 36). The power to enforce statutory liability was held to reside solely in the district courts. On the basis of this statutory interpretation and the finding that the appellee was threatened with irreparable injury, principally by reason of anticipated withdrawal of bank credit (R. 35), a permanent injunction was issued.[16]

We will demonstrate that the statutory interpretation adopted by the court below is erroneous. However, regardless of issues on the merits, we strongly urge that the court below, sitting as a court of equity, erred in enjoining the holding of the hearing.

---

[15] As we show below, *infra*, pp. 38–39, this is the actual course pursued in those instances in which, after a final determination by the National Enforcement Commission in Washington, a wage stabilization violation is found to have occurred and an appropriate disallowance certified to the Commissioner of Internal Revenue.

[16] In support of its conclusion, the court below cited the district court opinion and judgment in *Jonco Aircraft Corp.* v. *Franklin*, 114 F. Supp. 392 (N. D. Tex.) which was reversed by this Court in 346 U. S. 868.

289139—54——3

I

THE COURT BELOW SHOULD HAVE ABSTAINED FROM EXERCISING ITS EQUITABLE POWERS TO ENJOIN THE HOLDING OF THE HEARING

A. THE ACTION OF THE COURT BELOW PREMATURELY INTERFERED WITH THE ORDERLY UTILIZATION AND EXHAUSTION OF THE ADMINISTRATIVE PROCEDURES AND REMEDIES

The action of the court below, forbidding the holding of a hearing by the Enforcement Commission, violated fundamental rules which govern the delicate relationship between the exercise of judicial powers and administrative procedures. Cf. *United States* v. *Morgan*, 307 U. S. 183, 190–191. First is the "exhaustion" rule, the rule that a court of equity will not interfere to prevent the orderly utilization of an available administrative procedure. Coupled with this rule of restraint is the principle that a court of equity will only review administrative activity which has ripened into an order exerting compulsive effect upon the one who seeks the court's aid, and then only in the absence of an adequate remedy at law. Either or both of these rules should have been applied by the court below in this case. In sharp contrast to the decision below is the action of another statutory three-judge court in the Southern District of California in denying an injunction, in a salary stabilization case, to appellee herein on allegations and facts essentially identical with those involved in the instant wage stabilization case. *Grand Central Aircraft Corp.* v. *Jones*, 24 CCH Labor Law Reporter

BLEED THROUGH

BLURRED COPY

No. 67832; see also *Sierra Drawn Steel Corp.* v. *Gregory*, 115 F. Supp. 545 (S. D. Cal.).

1. Nothing is more plainly established than the rule that no one "* * * is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 383–384; *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540, 543; *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U. S. 802; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752; *Securities & Exchange Commission* v. *Otis & Co.*, 338 U. S. 843; *Public Service Commission of Utah* v. *Wycoff Company, Inc.*, 344 U. S. 237, 246; *Franklin* v. *Jonco Aircraft Corp.*, 346 U. S. 868; *Public Utilities Commission of California* v. *United Air Lines*, 346 U. S. 402. And no exception to this principle is created by allegations, such as those put forward by appellee in the court below, of constitutional invalidity or lack of statutory coverage or authority. *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 771 *et seq.*; *Franklin* v. *Jonco Aircraft Corp., supra; Myers* v. *Bethlehem Shipbuilding Corp., supra; Lawrence* v. *St. L.-S. F. Ry.*, 274 U. S. 588; *White* v. *Johnson*, 282 U. S. 367, 373; cf. *Gorham Manufacturing Co.* v. *State Tax Commission*, 266 U. S. 265. Nor is the "exhaustion" rule rendered inapplicable by the circumstance that the admininstrative remedy is

prescribed by regulation rather than by statute. *Fahey* v. *Mallonee,* 332 U. S. 245; *Goldsmith* v. *Board of Tax Appeals,* 270 U. S. 117, 123; *Red River Broadcasting Co.* v. *Federal Communications Commission,* 98 F. 2d 282, 286 (C. A. D. C.), certiorari denied, 305 U. S. 625, and see the recent opinion of Mr. Justice Reed in his denial of stay in *Twentieth Century Air Lines* v. *Ryan,* 98 L. Ed. (Adv. pp. 29, 32). On the contrary, the reason underlying the rule, namely, that the exhaustion of administrative procedure may yield a result which will obviate the need for any judicial consideration or render precise the exact scope of decision necessary, gains in force when challenges as to constitutionality or statutory coverage may thus be avoided or narrowly defined. *Aircraft & Diesel Corp.* v. *Hirsch, supra,* 772.

The considerations upon which the rule is based make obvious its applicability herein.[17] If the regional hearing had been permitted, it might have resulted in a finding that no violation on appellee's part had occurred or that, if a viola-

[17] We are not here concerned with situations where administrative orders become effective prior to the utilization of the administrative remedies, in which circumstances this Court has intimated that the requirement of exhaustion of remedies might be relaxed. Cf. *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752, 773; Administrative Procedure Act, Section 10 (c), 60 Stat. 237, 243. Nor are we concerned with cases in which final orders are issued in matters ancillary to a hearing. Cf. *Utah Fuel Co.* v. *National Bituminous Coal Commission,* 306 U. S. 56.

BLEED THROUGH

BLURRED COPY

tion had occurred, no disallowance or no more than a nominal disallowance was warranted in the light of the surrounding circumstances. The matter would there have ended. If, on the other hand, a violation had been found and a disallowance recommended, appellee had an appeal as of right to the National Enforcement Commission in Washington which might have sustained any or all of appellee's contentions. Again, there would have been no occasion for resort to the courts.[18]

2. The error of the court below in preventing the orderly utilization of the available administrative procedure is underscored by consideration of the closely related principle, clearly applicable here, that "administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Chicago and Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 112–113; *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 309; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 130–131. Here, the proceedings enjoined were remote from any compulsory stage. The function of the

[18] The same result might be said to flow from an application of the equitable doctrine of clean hands. If, as appellee here contends, it has committed no violation, it may be presumed that the hearing officials, in the regular discharge of their duties, would so find. *Bourjois, Inc.*, v. *Chapman*, 301 U. S. 183, 188. If, on the other hand, violations would be discovered on the hearing, a court of equity should not aid in avoiding that discovery.

Enforcement Commissioner was to conduct a hearing and to submit to the National Enforcement Commission in Washington his findings with regard to the payment *vel non* of illegal wages and his determination as to the amount to be disallowed in the case of a violation (GPR 1, Sections 2.3, 4, *infra,* pp. 97–101). The activity of the Enforcement Commissioner, clearly without compulsory effect, would have terminated at this point (GPR 1, Section 4.1 (e), *infra,* pp. 97–98, 100). The National Enforcement Commission in Washington alone would have had the power to certify a disallowance and this only after a *de novo* review of the record on appeal, available to appellee as a matter of right[19] (GPR 1, Sections 5.1, 5.2, 6.1, *infra,* pp. 101–103).

The administrative action enjoined in the instant case was considerably further from an order imposing an obligation or determining a legal relationship than the orders held not reviewable in the *Chicago and Southern* and *Los Angeles and Salt Lake* cases. In the former, the Civil Aeronautics Board had completed its proceeding and entered its order; but the order was held not judicially reviewable because it required approval by the President. In the latter, the Interstate Commerce Commission had entered an order determining the "final value" of the railroad's property under the Valuation Act, but the valuation report was held not reviewable

[19] Even where an employer did not appeal, the Enforcement Commissioner's findings and recommendations did not become effective automatically but only after scrutiny and adoption by the National Enforcement Commission. GPR 1, Section 4.1 (f), *infra,* p. 100.

BLEED THROUGH

BLURRED COPY

because it did not require action or determine rights but was "merely preparation for possible action in some proceeding which may be instituted in the future." 273 U. S. at 309–10. In this case, the lower court has interfered prior to the entry of even a preliminary order which might be submitted to a superior authority for consideration or approval. The court below has prevented the holding of a hearing by the official who could at most have submitted recommendations to a superior body. It would seem to follow *a fortiori* from the *Chicago and Southern* and *Los Angeles* cases that the present suit is premature. Indeed, the *Chicago and Southern* case indicates that for the courts "to revise or review an administrative decision which has only the force of a recommendation" would be to render an advisory opinion in a manner not authorized by the Judiciary Article of the Constitution. 333 U. S. at 113–114.

In any event, since the only official enjoined is a hearing officer who could merely have formulated recommendations, there was no occasion for such intervention. *Pennsylvania R. Co.* v. *Labor Board,* 261 U. S. 72, 84; *Employers Group* v. *National War Labor Board,* 143 F. 2d 145 (C. A. D. C.); *National War Labor Board* v. *Montgomery Ward & Co.,* 144 F. 2d 528 (C. A. D. C.). Final action in the administrative proceeding here involved could have been taken only by officials in Washington who were not made parties to this case. Merely naming such officials in the complaint could not suffice to bring them within the jurisdiction of the court below. And they

were not served. In these circumstances, there was a fatal lack of indispensable parties. *Blackmar* v. *Guerre,* 342 U. S. 512.[20]

B. THE COURT BELOW ALSO ERRED IN FINDING THAT APPELLEE HAD MADE A SHOWING OF IRREPARABLE INJURY WARRANTING THE ENJOINING OF A HEARING

Where, as here, no hearing had been held, no compulsive order was imminent, and the only officials capable of final actions were beyond the jurisdiction of the court, there was no proper occasion for the court below to consider or pass upon appellee's allegations as to the injurious effect of the proposed administrative hearing upon the conduct of its business. Assuming, however, that the question should have been reached, we submit that the court below erred in finding that appellee had made a satisfactory showing.

Specifically, the court below found that "* * * the continuance of the threatened administrative proceeding will cause [appellee's] bank credit to be shut off and will disable [appellee] from continuing its operations" (R. 37). In addition, the court below, by reference to paragraph XV of the complaint (R. 37, 7), accepted the following allegations with regard to irreparable injury: (i) that appellee would be threatened for a period of time with retroactive disallowance of illegal wage payments and that this contingent

[20] It should be noted that the injunction issued below did not purport to reach the National Enforcement Commission or its members. *Supra,* p. 13.

BLEED THROUGH

BLURRED COPY

liability would prevent appellee from entering into contracts or continuing and expanding its business in a normal fashion until the liability was determined; (ii) appellee's officers and employees would be required to spend large amounts of time in preparing the case and acting as witnesses, counsel would have to be retained, and that all of such expenses incident to the administrative proceeding would be irrevocably lost to appellee; (iii) a certification of disallowance by the National Enforcement Commission to another government agency would require the receiving agency to make the disallowance, without any right in plaintiff to attack the disallowance before any court.

Appellee thus alleged, and the court below accepted, two classes of irreparable injury. The first category consisted of more or less customary allegations with regard to the inconvenience and expense of appellee resulting from the proposed administrative proceeding. The core of this contention, specifically accepted by the finding of the court below, was the claim that appellee's relationships with third parties, principally private lending or financing institutions, would be adversely affected.[20a] The second category consisted

[20a] There is no reason to assume that these types of injury would be any less if enforcement was by the courts or through the Treasury and ordinary tax review procedures, which appellee apparently believes unobjectionable. Appellee can only avoid such injuries if he can completely block all means by which the law may be enforced against it.

of the claim that appellee would not be able to obtain court review of a disallowance certified after the completion of an administrative proceeding. Neither of these categories should have been held sufficient to justify equitable intervention.

1. Turning first to the matter of the expense and business inconvenience claimed, it is well settled that the rule requiring the exhaustion of the administrative remedy cannot be circumvented by the claim that the expense and annoyance caused by the administrative proceedings would result in irreparable injury. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51; *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209, 222. These inconveniences, common to every lawsuit and not, as appellee here seems to contend, peculiar to administrative proceedings, "are part of the social burden of living under government" (*Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. 2d 97, 100 (C. A. 5)); "no way has been discovered of relieving a defendant from the necessity of a trial to establish" the groundlessness of a charge. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51–52.

In short, this Court has repeatedly recognized, frequently in circumstances in which the proposed governmental action has had far more direct and immediate impact on the conduct of the complainant's business, that the unfavorable effect of impending proceedings on business affairs constitutes

BLEED THROUGH

BLURRED COPY

no more than the normal incidents of any large or serious litigation and cannot justify the exercise of the powers of a court of equity. In the *Aircraft & Diesel* case, the Government had prohibited, pending the outcome of a renegotiation controversy, the corporation's customers from paying over to the corporation approximately $270,000. Here, appellee's routine contentions with regard to the expense and inconvenience of the proceeding clearly fall far short of showing that sort of injury which would justify the issuance of an injunction.

No difference in result occurs if specific attention be directed to appellee's relationships with banks or other lending institutions.[21] This Court has consistently held that the anticipated adverse effect of administrative proceedings upon a company's contractual relationships with third parties, including its private financial arrangements and credit standing, does not constitute the sort of irreparable injury which suffices to bring a case within equity jurisdiction. *United States* v. *Los Angeles & Salt Lake R. R.,* 273 U. S. 299, 314–315; *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752, 777–778;

[21] The practical consequences of according special weight to impairment of credit allegations are readily foreseeable. The draftsman of the complaint can easily insert the allegation. At the hearing, a friendly witness can, with equal ease, prophecy the potential dire effects upon the complainant's credit standing. More difficult would be the task of refuting such a witness' estimate as to future conduct, usually on the part of the complainant's bank (cf. R. 62–73), or to produce rebuttal witnesses from other lending institutions.

Twentieth Century Air Lines v. *Ryan,* 98 L. Ed. (Adv. pp. 29, 32), opinion of Mr. Justice Reed upon denial of stay; see, also, *Arrow Distilleries* v. *Alexander,* 24 F. Supp. 880 (D. C. D. C., three-judge court).

In *United States* v. *Los Angeles & Salt Lake R. R.,* 273 U. S. 299, appellee had brought a suit in equity in order to suppress a valuation report prepared by the Interstate Commerce Commission. The complaint alleged that the Commission did not have the statutory authority to issue an order determining the value of the railroad's assets and that the publication of the report would result in irreparable injury. In amplification of the latter allegation, the railroad claimed that the report had grossly underestimated the corporation assets, actually amounting to $85,000,000, by assigning to them a value of merely $45,000,000, a figure considerably below that of the bonded indebtedness, thereby imperiling the railroad's credit and preventing it from obtaining the additional capital required for its normal growth and development. (Record on Appeal, No. 414, October Term 1926, pp. 26–28.) This Court stated that no basis for equitable action against the Commission was supplied by allegations, comparable to those rejected in *Pennsylvania R. Co.* v. *Labor Board,* 261 U. S. 72, that the alleged undervaluation would injure the railroad's credit with third parties, 273 U. S. at 314.

BLEED THROUGH

BLURRED COPY

Again in the *Aircraft & Diesel Corp.* case, the Court rejected as insufficient bases for equitable relief allegations that the appellant's credit might be impaired. The Court stated (331 U. S. at 777, n. 42):

> It is alleged that appellant, unless allowed to maintain this suit, will be caused unnecessarily to run the risk of *impaired credit* or insolvency of customers directed to withhold funds; *that its working capital essential to carrying out its obligations with contractors and subcontractors would be reduced;* that its operations "will be hampered and its business irreparably damaged by the reduction of its working capital"; and that it will be forced either to continue supplying customers directed to withhold payment, impairing its assets and the interests of stockholders or, in the alternative, to refuse making such shipments with the *asserted consequence of being unable to continue in business,* "inasmuch as a substantial portion of its market for its products presently is prime contractors with the United States and subcontractors thereof." [Italics supplied.]

The injury alleged was of the same type as that asserted here. This injury would have resulted from the direct withholding by the Government of $270,000.[22] In the instant case, there has been no such tangible deprivation as the withholding of any such

[22] The actual amount of excess profits determined was $1,265,000. Deduction of tax credits reduced the amount actually withheld to $270,000. 331 U. S. at 758.

substantial sum, or even a determination that any sum at all is due, but only the collateral effect that third parties might shut off credit because of the institution of the enforcement proceeding.

2. Appellee also alleged, as the basis of its request that the hearing before the Enforcement Commissioner be enjoined, that, if a disallowance certification was finally issued by the National Enforcement Commission at the end of the administrative procedure, it would be "* * * unable to attack such action before said agencies or before any court" (R. 7). This allegation, accepted by the court below (R. 37), was advanced as a sufficient showing of irreparable injury to warrant the issuance of an injunction.

Similar contentions have often been considered and rejected. However, before discussing the applicable principles, we wish to place before the Court the exact nature of the situation of which appellee complains. As indicated above, the hearing before the Enforcement Commissioner and the subsequent hearing on appeal before the National Enforcement Commission in themselves would have resulted in no order with compulsive impact upon appellee. If violations were found and appropriate disallowances fixed and certified, actions with compulsive effect upon appellee occurred only when, pursuant to the certification, the Commissioner of Internal Revenue made the appropriate tax disallowance. Whatever the precise form the Commissioner's action took, appellee then had available

BLEED THROUGH

BLURRED COPY

the usual remedies of the taxpayer, viz, a petition to the Tax Court (26 U. S. C. 272), operating as a stay of the tax collection until final decision of the court, or, after petition for a refund to the Commissioner (26 U. S. C. 322), a suit for a refund in a district court or in the Court of Claims (26 U. S. C. 3772).

We think it thus clear that appellee has access to an appropriate legal tribunal in which, as soon as compulsive action has been taken, it can seek and obtain the review to which it is entitled. And no earlier intervention by a court of equity is justified by reason of appellee's charge that Section 405 (b) contains no provision with regard to judicial review and that Section 6 of General Order No. 15, *infra*, p. 93, provides that disallowance determinations "* * * shall be final and not subject to review by The Tax Court of the United States or by any court in any civil proceeding."

That the failure of a statute specifically to provide for judicial review does not make such review unavailable is clear. *Fahey* v. *Mallonee*, 332 U. S. 245, 256; *Stark* v. *Wickard*, 321 U. S. 288; *Board of Governors of the Federal Reserve System* v. *Agnew*, 329 U. S. 441; Section 10, Administrative Procedure Act, 5 U. S. C. 1009. Review, of course, would be supplied where required by the Constitution. *Ng Fung Ho* v. *White*, 259 U. S. 276. Such review, however, is accorded at the termination of the administrative process, not before. *Fahey* v. *Mallonee, supra.* There would be even less reason

for requiring review at an intermediate stage if it be assumed that Congress meant to preclude all judicial review, as in *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297. In either event, whether judicial review is or is not available, it cannot take place before exhaustion of the administrative remedy. *Fahey* v. *Mallonee* so holds specifically, since it refused to interfere with the administrative process, although specifically not deciding "whether the determination of the Board in such proceeding is subject to any manner of judicial review."

In this case the statute creates no difficult problem, for it says nothing about judicial review, and would not appear to prohibit it by implication. Insofar as that portion of the regulation barring review is concerned, it either is lawful or it is not. If it is not, it is obviously separable from the remainder of the regulation—and this would leave the tax disallowance open to review in the Tax Court or other appropriate tribunal for review of tax determinations. If it is valid, it would bar determination by a court prior to the administrative proceeding as well as after.

In short, whatever review appellee is entitled to under the statute or the Constitution, it can obtain, before any governmental sanction applies, in the normal course of a suit to overturn the disallowance of a tax deduction by the Commissioner of Internal Revenue—if there should be such a deduction, which in turn depends on the outcome

BLEED THROUGH

BLURRED COPY

of the proceeding before the National Enforcement Commission which appellee has prevented from getting started.

II

SECTION 405 (b) OF THE DEFENSE PRODUCTION ACT PROVIDES FOR ADMINISTRATIVE DETERMINATION AS TO THE EXISTENCE OF VIOLATIONS OF WAGE STABILIZATION ORDERS AND ADMINISTRATIVE CERTIFICATION OF APPROPRIATE DISALLOWANCES

As indicated above, we feel that the court below erred in proceeding to a consideration of appellee's contentions with regard to statutory interpretation. Assuming, however, such issue to be available for decision, we submit that the decision below nevertheless must be reversed.

The statutory dispute turns on the meaning to be accorded Section 405 (b) of the Defense Production Act of 1950, derived from Section 5 of the Stabilization Act of 1942 (56 Stat. 767, 50 U. S. C. App. 965), which provides:

> No employer shall pay, and no employee shall receive, any wage, salary, or other compensation in contravention of any regulation or order promulgated by the President under this title. The President shall also prescribe the extent to which any wage, salary, or compensation payment made in contravention of any such regulation or order shall be disregarded by the executive departments and other governmental agencies in determining the cost

289139—54——4

> or expenses of any employer for the purposes of any other law or regulation.

The first sentence condemns the payment of wages or salaries paid in contravention of applicable stabilization regulations. The second sentence requires the President to prescribe the extent to which *"any"* unlawful wage payment may be disregarded by the executive departments in determining an employer's costs. This language read literally authorized the President, or the person or agency to which he delegated his functions,[23] to determine the extent of disallowance in the individual case, and not merely, as appellee contends, to prescribe general standards to be administered by the courts. Any doubt as to which of these two interpretations should be given the sentence in question is resolved by the background and history of the provision which, as will appear below, proves that the provision was intended to be construed as its administrators have construed it.

In any event, it is clear from the provision in question that the disallowances in individual cases were initially to be determined "by the executive departments and other governmental agencies," for that is what this sentence says. This means that the appellee's argument that the courts must in the first instance determine whether there has been a

[23] There is, of course, no question that the President can carry out this power by proper delegation, as he has done. Section 703 (a) of the Defense Production Act of 1950, 50 U. S. C. App. (Supp. V) 2153 (a), *infra*, pp. 82–83.

BLEED THROUGH

BLURRED COPY

violation is clearly inconsistent with the statutory scheme.

There may be a question as to the extent to which the administrative determination, whether made by one executive department or another or with or without a hearing, will ultimately be binding upon courts—whether the courts are to decide the issues *de novo,* to accept administrative determinations lawfully made and supported by substantial evidence, or to give the administrative decision even greater finality. Cf. (*Woodworth Co.* v. *Kavanagh,* 102 F. Supp. 9 (E. D. Mich.), affirmed, 202 F. 2d 154 (C. A. 6)). However this question as to the nature of the ultimate judicial determination is decided, the legality of the procedure for making the initial determination administratively would not be affected. This analysis of the problem also points up the prematurity of this case, for the reason stated at pages 26–40, *supra.*

A. THE LEGISLATIVE HISTORY OF SECTION 405 (B) PLAINLY SHOWS THAT CONGRESS INTENDED ADMINISTRATIVE ENFORCEMENT OF THE WAGE STABILIZATION PROGRAM

1. *Section 405 (b) is substantially identical with a provision in the World War II stabilization legislation which Congress knew had been administratively enforced.* The Defense Production legislation, introduced in the Eighty-first Congress, contained no provisions with regard to price or wage control. Such provisions were inserted as amendments in both Houses (S. Rept. 2250, 81st Cong.,

2d Sess., pp. 4–5, 20–21; 96 Cong. Rec. 11631, 11867 (House)) and became Title IV of the Act. In adopting the proffered amendment, Congress utilized much of the language that had appeared in World War II emergency legislation with full awareness of the experience developed during the administration of the legislation. See, *e. g.*, S. Rept. 2250, 81st Cong., 2d Sess., pp. 20–29. Section 405 (b), the provision here in issue, was specifically derived from Section 5 of the Stabilization Act of 1942, *supra*. To show the identity of the language of the two provisions we quote Section 5 of the 1942 Act (50 U. S. C. App. 965 (a)), with all new words contained in Section 405 (b)) of the 1950 Act italicized and all deletions shown in brackets:

> (a) No employer shall pay, and no employee shall receive, *any* wage[s] or salarie[s] *or other compensation* in contravention of *any* [the] regulation[s] *or order* promulgated by the President under this *title* [Act]. The President shall also prescribe the extent to which any wage, [or] salary, *or compensation* payment made in contravention of *any* such regulation[s] *or order* shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation.

The pertinent Senate Report states that Section 405 (b) "* * * adopts the language of the Stabilization Act of October 2, 1942, respecting the pen-

BLEED THROUGH

BLURRED COPY

alties to be applied for violations of the wage and salary stabilization program * * *." S. Rept. 2250, 81st Cong., 2d Sess., p. 39. The report further stated that the "* * * disallowance of illegal wage payments as a cost of doing business, for purposes of computing taxes, Government contract payments, and for purposes of establishing price ceilings, was an effective deterrent * * *." *Ibid.*

Under Section 5 of the 1942 Act, regulations were issued by the President on October 27, 1942 (7 F. R. 8748)[24] which served as the model for all regulations subsequently issued under that statute and under Section 405 (b) of the 1950 Act.[25] As examination of these regulations shows, Appendix, *infra,* pp. 87–89, Section 5 of the 1942 Act was implemented by a delegation to the National War Labor Board of authority to certify, after administrative procedure, appropriate disallowances. The procedure employed was almost identical to

[24] It should be noted that these regulations were not only signed by the Economic Stabilization Director but were approved by President Roosevelt. This unusual method of issuance of a regulation may have been deemed necessary by reason of the fact that Paragraph 4001.16 of the Regulations provided that any inconsistent provisions of Executive Order 9250, dated October 3, 1942 (7 F. R. 7871), were superseded.

[25] Amendments to these regulations were subsequently made to meet changing requirements during the administration of the emergency control program. See, *e. g.*, 8 F. R. 11960; 9 F. R. 14547; 10 F. R. 9628, 14820. None of these changes affected the problem with which we are here concerned, namely, the utilization of tax disallowances based upon administrative enforcement procedure.

that prescribed by the regulations involved in the present case. After the acquisition of initial experience in the enforcement field, a detailed procedural regulation was issued by the National War Labor Board on July 30, 1943. 9 F. R. 4681. Again, the administrative procedure there set forth, leading ultimately to the imposition of disallowance sanctions, is almost identical with that involved in the instant case.

The administration of the World War II wage stabilization enforcement program came to the attention of Congress on many occasions. For example, at appropriation hearings held on June 3, 1943, Mr. Lloyd K. Garrison, Executive Director and General Counsel of the National War Labor Board, in response to questions from the Committee Chairman, outlined in precise detail the entire enforcement program in connection with wage stabilization, including the procedure followed, the workload involved in the program, and the personnel needs for the program. Hearings before Subcommittee of the House Committee on Appropriations, 78th Cong., 1st Sess., on the National War Agencies Appropriation Bill for 1944, Part 2, pp. 667–668. Mr. Garrison there pointed out that alleged violations were heard by a Regional War Labor Hearing Board, that, after a full hearing, the employer possessed a right of appeal to the National War Labor Board, and that after termination of the appeal procedure a disallowance was certified in the event a violation was found.

BLEED THROUGH

BLURRED COPY

Again, at an appropriations hearing held on March 28, 1944, Mr. William H. Davis, Chairman of the National War Labor Board, testified, in response to questions, with regard to the Board's wage stabilization enforcement program, describing the Board's handling of enforcement by administrative hearings and disallowances. Hearings before Subcommittee of the House Committee on Appropriations, 78th Cong., 2d Sess., on the National War Agencies Appropriation Bill for 1945, Part 1, pp. 240–241. See, also, the testimony of Mr. Jesse Freidin, General Counsel of the Board, at the same hearing (pp. 303–304), in which Mr. Freidin explained that the Board's administrative procedure was its only method of civil enforcement. At an appropriations hearing held on April 23, 1945, Dr. George Taylor, Chairman of the National War Labor Board, personally submitted, in support of a request for funds for legal personnel, an extremely detailed report with regard to administrative enforcement of the wage stabilization program. Hearings before Subcommittee of the House Committee on Appropriations, 79th Cong., 1st Sess., on the National War Agencies Appropriation Bill for 1946, pp. 12–13. Dr. Taylor furnished statistics, covering the period October, 1942, through December 8, 1944, which showed the number of enforcement cases received, disposed of, and still pending before the National War Labor Board. For the period covered, 1,295

disallowances had been certified after the exercise by the Board of its "* * * authority to determine whether a violation exists * * *." *Ibid.*[26]

Under the wage stabilization enforcement program carried out pursuant to Section 5 of the 1942 Stabilization Act, approximately 68,233 cases resulting in disallowances of $19,018,820.19 were handled by the National War Labor Board from 1942 to 1945 (*Termination Report of the National War Labor Board,* Vol. I, pp. 437–441); 30,071 cases disallowing nearly $10,000,000 were processed by the National Wage Stabilization Board from January 1, 1946 to February 24, 1947 (*The National Wage Stabilization Board,* p. 230). Thereafter, Section 5 was administered by the Treasury Department, which imposed sanctions totaling approximately $700,000. *Annual Report of the Commissioner of Internal Revenue for 1948,* pp. 33–34; same for 1949, pp. 26–27.[27] Thus,

[26] It should be noted that during and subsequent to the period covered by the legislative material described above, Congress extended Section 5 on three occasions. Acts of June 30, 1944, 58 Stat. 632, 643; June 30, 1935, 59 Stat. 306; July 25, 1946, 60 Stat. 664. Reenactment by Congress in the light of its specific knowledge as to the administrative enforcement utilized under Section 5 of the 1942 Act must be taken as a ratification of that practice. Cf. *Hecht* v. *Malley*, 265 U. S. 144, 153; *Helvering* v. *Winmill*, 305 U. S. 79, 83; *Commissioner* v. *Flowers*, 326 U. S. 465, 469; *Shapiro* v. *United States*, 335 U. S. 1, 16; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 308–311.

[27] For the general history of the enforcement of the Stabilization Act of 1942, including Section 5, see *Termination Report of the National War Labor Board*, Vol. I, pp. 428–441;

BLEED THROUGH

BLURRED COPY

under the 1942 program, nearly 100,000 proceedings took place and disallowances totaling nearly $30,000,000 were made.

In the light of this interpretation and administration of Section 5 of the 1942 Act, the conscious reutilization by Congress of its provisions and purpose in the 1950 Act can only be taken as the approval of the interpretation of the earlier statute. Cf. *Hecht* v. *Malley,* 265 U. S. 144, 153; *Helvering* v. *Winmill,* 305 U. S. 79, 83; *Commissioner* v. *Flowers,* 326 U. S. 465, 469; *Shapiro* v. *United States,* 335 U. S. 1, 16; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 308–311.[28]

2. *Legislative events, since the enactment of Section 405 (b), fully demonstrate congressional awareness and approval of the enforcement program utilized under its provisions.*

(a) In June, 1951, Section 405 (b) was implemented by regulations which provided for administrative enforcement. *Supra,* p. 4. At that time,

---

The National Wage Stabilization Board, January 1, 1946 to February 24, 1947, pp. 223–235; *Annual Report of the Commissioner of Internal Revenue, 1947*, pp. 62–63; *id.*, 1948, pp. 33–34; *id.*, 1949, pp. 26–27.

[28] Though not a part of the legislative history of Section 5, the Court's attention is directed to judicial acceptance of the administrative enforcement program. See *Troy Laundry Co.* v. *Wirtz*, 155 F. 2d 53 (C. A. 9), certiorari denied, 329 U. S. 723; see, also, *N. A. Woodworth Co.* v. *Kavanagh*, 102 F. Supp. 9 (E. D. Mich.), affirmed on the opinion of the District Court, 202 F. 2d 154 (C. A. 6); *Weather-Seal Mfg. Co.* v. *Commissioner of Internal Revenue*, 16 T. C. 1312, affirmed, 199 F. 2d 376 (C. A. 6); cf. *Hofferbert* v. *Anderson Oldsmobile Inc.*, 197 F. 2d 504, 508 (C. A. 4).

an amendment to provide judicial review of wage stabilization administrative enforcement was rejected. 97 Cong. Rec. 8555. At the same time, in connection with the extension of the price and wage control provisions of the Defense Production Act beyond June 30, 1951, Congress extended the wage control disallowance provisions to violations of price control regulations (Section 405 (a), as amended, 65 Stat 136),[29] and, in addition, created a similar authority to prevent fines, payments in compromise or by way of restitution, and other payments, from being charged back to the Government by way of income tax deductions (Section 409 (d), as added, 65 Stat. 136).[30] Since all appropriate methods of judicial enforcement had previously been available for the price control regulations, this addition of the tax disallowance sanction previously applicable only to the wage stabilization regulations shows plainly that Congress believed that the latter constituted a different means of enforcement. A detailed discussion of the addition of administrative disallowance as a separate price enforcement sanction is set forth at pages 61–64, *infra*.

---

[29] Cf. *Commissioner of Internal Revenue* v. *Weisman*, 197 F. 2d 221 (C. A. 1); *Hofferbert* v. *Anderson Oldsmobile Inc.*, 197 F. 2d 504 (C. A. 4), arising under the 1942 legislation.

[30] H. Rept. 639, 82d Cong., 1st Sess., p. 40; see, also, Letter of Deputy Attorney General Peyton Ford to the Chairman of the House Committee on Banking and Currency dated June 4, 1951; Hearings before the Committee on Banking and Currency, House of Representatives, 82d Cong., 1st Sess., on H. R. 3871 (Defense Production Act Amendments of 1951, pp. 652, 653).

BLEED THROUGH

BLURRED COPY

(b) By Section 712 of the Defense Production Act of 1950, 64 Stat. 820, 50 U. S. C. App. (Supp. V) 2162, Congress formalized the experience gained during and after World War II in connection with the need and desirability of close and constant contact with the administration of emergency control programs. Section 712 provided for the creation of a Joint Committee on Defense Production whose function it was "* * * to make a continuous study of the programs authorized by this Act" to aid the standing committees with jurisdiction over any part of such programs, and to report and recommend from time to time to both Houses of Congress. The Joint Committee was specifically empowered to require consultations at any time by officials or agencies with regard to activities under programs authorized by the statute.

The Joint Committee dealt, of course, with every aspect of the defense program and its published reports and submissions necessarily ranged over a wide area. However, as early as October 1951, the Joint Committee transmitted to Congress a report by the Wage Stabilization Board, prepared at the Committee Chairman's request, which concisely described the administrative enforcement program. Referring to the initial establishment of the National Enforcement Commission, the report stated that "* * * the enforcement commission will sit in a quasi judicial capacity to determine whether there have been violations and what penalties should be invoked. * * *." *First Annual Report of the Joint Committee on Defense Production,* S. Rept. 1040,

82d Cong., 1st Sess., p. 101. In the Joint Committee's Second Annual Report submitted in October 1952, there is contained a report by the Wage Stabilization Board, prepared at the Committee's Chairman's request, which describes in great detail the administrative enforcement procedure, precisely the same as that here in issue, followed in connection with violations of wage stabilization orders. S. Rept. 3, 83d Cong., 1st Sess., pp. 112–113.

(c) The Defense Production Act Amendment of 1952, 66 Stat. 296, approved on June 30, 1952, extended the operation of the price and wage control provisions of the statute until April 30, 1953. Prior to this extension, administrative enforcement of Section 405 (b) had been implemented by the issuance of a new and very detailed regulation, General Order No. 15, pp. 5–8, *supra*. Full congressional awareness of the practice under the statute is evidenced by the Conference Report on the 1952 Amendment which states (H. (Conference) Rept. No. 2352, 82d Cong., 2d Sess., p. 24):

> The conference substitute is not intended to preclude the Board from, *as at present, enforcing* wage stabilization regulations and policies. [Italics supplied.]

(d) Again, during hearings on a Supplemental Appropriations Act of 1954 (67 Stat. 418), the complete familiarity of both Houses of Congress with administrative enforcement under Section 405 (b) was once more demonstrated. A Presidential request for funds (H. Doc. 176, 83d Cong., 1st Sess.,

BLEED THROUGH

BLURRED COPY

pp. 4–5), including $290,000 for salaries needed in the liquidation of the Economic Stabilization Agency, was under consideration. Mr. Arthur S. Flemming, then Director of the Economic Stabilization Agency, presented testimony at both House and Senate hearings [31] on the item on the assumption that the Agency would be able to liquidate all of its affairs, including pending proceedings, prior to its physical termination on October 31, 1953. In discussing this prospect, colloquies between Mr. Flemming and members of the committees demonstrate clearly a familiarity with the administrative procedure utilized in wage stabilization violation matters.[32]

In the testimony before the House Committee, Mr. Flemming expressly referred to the steps taken in connection with enforcement of the wage and salary stabilization program, *viz,* the hearings before an Enforcement Commissioner, the findings to

[31] Hearings before the Subcommittees on Appropriations, House of Representatives, 83d Cong., 1st Sess., on H. R. 6200 (hereafter referred to as House Hearings) pp. 439–441. Hearings before the Committee on Appropriations, United States Senate, 83d Cong., 1st Sess., on H. R. 6200 (hereafter referred to as Senate Hearings) pp. 423–431.

[32] It might here be noted that, beginning in 1952, the National Enforcement Commission gave wide circulation to its decisions and that a considerable proportion of these was reported by Labor Law Services. See, *e. g.*, Bureau of National Affairs, Labor Relations Reporter, Wage and Salary Controls Binder 7, 100: 1151–1200z 52, reporting 45 of the 132 written opinions of the National Enforcement Commission.

be made by the latter, and eventual appeals to be handled by the National Enforcement Commission.[33] Similarly, the discussions at the Senate hearings (pp. 423–431) disclose that the Senators were fully informed of the administrative method of enforcing wage violations. These hearings, however, acquire added importance in relation to the correct congressional interpretation of the statute, since, as far as the Senators present were concerned, the testimony did not deal with an abstract and remote topic of administrative procedure but with this very case.

A Mr. Holland was permitted to testify on behalf of appellee concerning the instant proceedings. As a result, the Committee was advised of many, if not all, of the procedural details of this case in its administrative and judicial phases.[34] Most significant perhaps is the circumstance that Mr. Holland, recognizing the full familiarity of the Committee with the administrative means of enforcement, did not challenge their propriety. To the contrary, when asked by Senator Cordon who presided over the hearing,[35] whether he challenged the power of the Economic Stabilization Agency to inquire into alleged wage violations, he conceded that the instant proceeding was properly brought and that his only objection to the second (the salary) case[35a] was that it had been brought after Title IV

[33] House Hearings, p. 441.
[34] Senate Hearings, pp. 424, 426–427.
[35] Senate Hearings, p. 377.
[35a] See p. 26, *supra.*

BLEED THROUGH

BLURRED COPY

had expired.[36] In answer to a question by Senator Thye, Mr. Holland conceded that the basic motive of his appearance before the Committee was to induce the Committee to deny to the Economic Stabilization Agency the funds required for the completion of enforcement proceedings.[37] Mr. Holland sought to explain his request on the ground that such enforcement would result in discrimination against those wage regulation violators who had obtained injunctions and thus prevented the completion of the enforcement proceedings prior to the expiration of the stabilization program.[38] Senator

[36] "Senator CORDON. You do not question but what it was all right for the Economic Stabilization Agency at that time to inquire into the particular matter, do you?

"Mr. HOLLAND. Yes, sir.

"The first one is all right; the second one came during what is the liquidation period. And we do not believe it was appropriate for the Agency to start new cases. Our idea of liquidation would certainly be limited to the cases they had" (Senate Hearings, p. 427.)

[37] "Senator THYE. What you are asking us to do is to deny them the funds so that they cannot proceed further with the hearing?"

"Mr. HOLLAND. Let me state it differently.

"Senator THYE. Is that the point?

"Mr. HOLLAND. That is the basic point.

"Senator THYE. Is that not precisely what you are asking us?

"Mr. HOLLAND. The reason that we are asking it is that we think what the money is going to be used for will result in just handling a handful of cases.

"Senator CORDON. Your answer, then, is yes, is it not?

"Mr. HOLLAND. Yes, sir." (Senate Hearings, pp. 428–429.)

[38] Senate Hearings, pp. 428–431.

Cordon indicated on two occasions that he could not see any merit in this contention.[39]

At the conclusion of the hearings, the Senate Committee refused to appropriate the $290,000 for the liquidation of the Economic Stabilization Agency. This denial of the funds, however, was not based on the theory that the enforcement proceedings were unauthorized under the statute. On the contrary, it was plainly the position of the Committee that enforcement was to be completed. Its report stated that it was

> the sense of the committee that pending cases should be turned over to the Department of Justice for review so that the agency will not be continued by a continuation of these suits. [S. Rept. No. 677, 83d Cong., 1st Sess., p. 17.]

And while the Senate agreed with its committee and struck the appropriation from the bill (99 Cong.

[39] "Senator CORDON. You do not want any cases tried, no matter how flagrant, how long continued; is that the proposition?

"Mr. HOLLAND. Yes, sir.

"Senator CORDON. If so, I want to tell you that the chairman of the committee disagrees with you entirely." (Senate Hearings, p. 429.)

And again:

"Mr. HOLLAND. All we are after is equal treatment, and we do not believe we are getting it. That is why we are here today.

"Senator CORDON. I do not agree with you with respect to equal treatment. I think equal treatment is applying to equal cases. But equal treatment that every case must be prosecuted whether it is a frivolous case or not, I cannot agree with you." (Senate Hearings, p. 431.)

BLEED THROUGH

BLURRED COPY

Rec. (Daily Ed., July 30, 1953), p. 10705), the Conference Report (House Conference) Rept. No. 1090, 83d Cong., 1st Sess., p. 5, Amendment Nos. 76, 77) restored the funds for the liquidation of the Economic Stabilization Agency, concededly to be used in part for the winding up of pending wage enforcement proceedings.

Appropriation of funds in these circumstances and after full disclosure and discussion of the administrative methods employed, plainly manifests a Congressional intention to approve and ratify the existing system of administrative proceedings to enforce the disallowance sanction of section 405 (b). *Brooks* v. *Dewar,* 313 U. S. 354, 361; *Fleming* v. *Mohawk Co.,* 331 U. S. 111; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 308–315.

B. THERE IS NO VALIDITY TO ATTEMPTED CONSTRUCTIONS OF SECTION 405 (b) DESIGNED TO PREVENT ADMINISTRATIVE HEARINGS AND ENFORCEMENT

Putting to one side the compelling materials discussed above and assuming the statutory issue in this case to be one for resolution solely by the construction of language, the limiting interpretation urged by appellee and accepted by the court below cannot be sustained. As stated above, the court below held that only district courts could impose penalties for violations of the Defense Production Act although the President concededly could issue binding certifications of disallowance within the executive branch. The scope

of this interpretation of the statute is not entirely clear. Apparently, it could mean one of several things.

1. The court below may have intended to hold that the President's power under Section 405 (b) lay in the issuance of binding general instructions within the executive department. If this is so, there can be no question but that the President could have instructed the Treasury generally to disallow illegal wage payments, leaving to the Treasury the specific application of this general instruction.[40] In such case, the Treasury could have made disallowances for tax purposes and an employer's only judicial remedy would be the same as it is under the procedure presently in force, namely, a suit for a refund or a suit in the Tax Court.[41] If this is the purport of the interpretation below, its decision seems to have done no more than to condemn the careful intermediate hearing procedure afforded to employers by the procedure under Section 405 (b)—which gives greater protection than the normal Treasury procedure.

---

[40] It should be noted that, even in the absence of express command, it has always been the implied command of the taxing statute that illegal expenditures or those contrary to public policy should not be available as deductions or offsets to diminish the tax liability of the wrongdoer. *Textile Mills Corp.* v. *Commissioner*, 314 U. S. 326; *Commissioner* v. *Heininger*, 320 U. S. 467, 473.

[41] In its Motion to Affirm hereinbefore filed, p. 6, appellee appears to insist on the availability of this refund suit remedy.

BLEED THROUGH

BLURRED COPY

2. Although the court enjoined the administrative proceeding, it may be that it was basically objecting to the finality of what it called a penalty imposed by the administrative agencies rather than by the courts. But as we have stated earlier, the administrative procedure is not incompatible with subsequent judicial review. Whatever review appellee is legally entitled to will be available after any tax disallowance is made by the Treasury. Objections to administrative finality should not bar the otherwise entirely legitimate administrative proceeding.

The court below may have meant that the district court's role should occur at some point between the President and the imposition of a tax disallowance. Under this interpretation, the court would apparently become part of the administrative process leading to disallowance, passing upon complex and technical questions arising under wage stabilization regulations, ascertaining the appropriate amount of the disallowance to be made, and, presumably, issuing a directive to the Treasury.[42]

We will put to one side the constitutional difficulties created by this merging of district courts into the administrative process. It is sufficient to say there is nothing in the language of Section

[42] Though the court below stated that only district courts could impose penalties, it does not seem to have questioned the fact that administrative disallowance, appropriate in the circumstances of each particular case, was the available and appropriate sanction.

405 (b) itself which gives any support to the interpretation. On the contrary, the second sentence, taken alone, with its reference to disallowance by the "executive departments" plainly envisages administrative action. See pp. 42–43, *supra*.

The court below found the limitation by reference to those provisions in Section 706 (b) of the 1950 Act (*infra*, p. 84) which describe generally, in language plainly permissive, the jurisdiction of district courts to hear actions brought to enforce duties created under the Act. This general jurisdictional provision would not be sufficient to require Section 405 (b) to be given an interpretation contrary to that so clearly supported by its history.

The notion that this provision acts as a limitation upon Section 405 (b) seems to be derived from an argument, accepted by the court below, that the district court jurisdiction language of Section 706 (b) was novel in the 1950 Act and had no counterpart in the 1942 price and wage control legislation.[43] The suggestion is unsound. In the first place, the provisions of Section 706 closely resemble those of Section 205 of the 1942 Emergency Price Control Act, (*infra*, pp. 78-79. Section 205 (a) of the earlier statute provided for injunctive relief, Section 205 (b) for criminal

[43] Appellee's purpose in this contention was to attempt to sever the construction of Section 405 (b) from a consideration of Section 5 of the 1942 Stabilization Act and its clearly established meaning.

BLEED THROUGH

BLURRED COPY

penalties. And Section 205 (c) gave the District Courts jurisdiction of all proceedings under Section 205. The immediately subsequent paragraphs in 205 provided for suits for damages against price control violators. Section 706 (a) of the 1950 Act, like Section 205 (a), provided for injunctive relief. Section 706 (b), gives the District Courts jurisdiction over violations of the Act of all sorts; and although its wording is different, the scope is substantially the same as the prior Section 205 (c).

Secondly, it should be pointed out that Title IV of the 1950 Act contains its own remedial provisions which almost exactly parallel those contained in the earlier Section 205. Title IV was not a part of the original bills which became the Defense Production Act, although Section 706 was. When Title IV was added, it included Section 409, paragraphs (a) and (b) of which provided for injunctive and criminal remedies and paragraph (c) for suits for damages.

Clearly all these provisions together cover the same ground as did the former Section 205. There is thus no basis for asserting that Section 706 (b) was intended to constitute a greater limitation upon the subsequently inserted Section 405 (b) than were the similar provisions of the 1942 Act.

Any doubt that administrative enforcement in wage stabilization cases coexisted with the district court enforcement procedure utilized in price cases

is dispelled, we submit, by the manner in which Congress added administrative enforcement as a price violation sanction in 1951. See *supra*, p. 50. At that time, Section 405 (a), *infra*, pp. 80–81 was amended by the addition of language identical with that contained in connection with wage stabilization administrative enforcement, in Section 405 (b). In explaining the purpose of this amendment at the request of the Office of Defense Mobilization, the Deputy Attorney General stated that it was patterned after existing language in Section 405 (b) which in turn was based upon Section 5 of the 1942 Stabilization Act, both of which permitted administrative disallowances as to wage and salary payments made in violation of applicable stabilization regulations or orders. Hearings before the Committee on Banking and Currency, House of Representatives, 82d Cong., 1st Sess., on H. R. 3871 (Defense Production Act Amendments of 1951), p. 653. He stated that "* * * no similar authority presently [was] applicable to payments made in violation of price stabilization regulations or orders * * *" and that the "instant amendment would place payments illegal under price-stabilization regulations on the same basis with respect to their disallowance for tax purposes as presently are payments illegal under wage- and salary-stabilization regulations." *Ibid.* This new and additional enforcement sanction in connection with violations of price regulations or orders was accepted in legislation which also dealt with alterna-

BLEED THROUGH

BLURRED COPY

tive methods of price enforcement, *i. e.*, by district court proceedings. H. Rept. 639, 82d Cong., 1st Sess., p. 40.

That the administrative enforcement procedure provided in wage regulation cases by Section 405 (b) and in price regulation cases by Section 405 (a) thus amended is entirely separate from and independent of district court proceedings is illustrated by the action taken by Congress in amending Section 409, *infra*, pp. 81–82, the section dealing with district court proceedings. This amendment was also explained by Deputy Attorney General Ford at the request of the Office of Defense Mobilization. In addition to making available administrative enforcement by amending Section 405 (a), Section 409 was amended so as to provide for the certification for tax disallowance of fines paid as the result of criminal proceedings or of payments made in compromise or by way of restitution in price violation cases. Hearings before Committee on Banking and Currency, 82d Cong., 1st Sess., on H. R. 3871, p. 653; Section 409 (d), *infra*, p. 82. Thus, where Congress intended administrative disallowance to be utilized in connection with court proceedings or payments made to avoid judgments, it did so specifically and then only in connection with price violation cases. It should be observed that the disallowance amendment under Section 409 was not viewed as an initial enforcement technique against violations of stabilization regulations or orders, as were the disallowance provisions con-

tained in Section 405, but rather was seen as a method of protecting the Government from being charged, by way of tax deduction, with amounts paid as compromise or restitution. Hearings, *supra,* pp. 653–654.

It is clear from all of the above that the administrative disallowance procedure is a separate enforcement device, entirely independent of enforcement by way of district court proceedings, Appellee's argument to the contrary is no more than a strained attempt, at the eleventh hour, to avoid proper inquiry into the question of violations alleged to have been committed by it during the substantive wage control period.

III

THE TERMINATION OF THE PERIOD OF WAGE STABILIZATION CONTROL DID NOT AFFECT THE POWER TO CONDUCT AND COMPLETE ENFORCEMENT PROCEEDINGS WITH REGARD TO VIOLATIONS OCCURRING DURING THE CONTROL PERIOD

By the 1952 amendments to the Defense Production Act (June 30, 1952, 66 Stat. 296, 306), Congress provided for the termination of control programs at the close of April 30, 1953.[44] As this termination date approached, a number of employers for the first time sought to enjoin hearings scheduled to consider violations alleged to have taken place during the life of the program.

[44] Substantive control was suspended on February 6, 1953, by Executive Order No. 10434. 18 F. R. 809.

BLEED THROUGH

BLURRED COPY

As a result a number of the proceedings could not be brought to completion before the program expired on April 30, 1953.[45] Here, the holding of an administrative hearing originally scheduled to be held February 24, 1953, has been suspended as the result of court action instituted by appellee on February 13, 1953. *Supra,* pp. 12–14.

In this case, as in several of the other injunction proceedings directed against wage stabilization enforcement hearings, it was suggested that the power to hold a hearing had lapsed. Here, appellee alleged that the "* * * expiration, on April 30, 1953, of Title IV of the Act, relating to wage stabilization, terminated all authority conferred thereunder, and thus terminated any power or authority * * * to determine whether or not wage or salary payments had been made in contravention of the Act or to determine the extent to which any such wage or salary payments should be disallowed for the purpose of

[45] We have been advised by the Office of Defense Mobilization that, in addition to the proceeding involved the appellee herein, 19 enforcement proceedings are still pending as the result of litigation in which the administrative proceedings were sought to be enjoined. In some of these proceedings, for example, in the appellee's salary case (24 CCH Labor Law Reporter No. 67832), the effort to obtain an injunction was unsuccessful, but the holding of the administrative enforcement hearing was delayed during the period of time consumed by the litigation. Proceedings in a similar situation are those which involve *Sierra Drawn Steel Corp.* v. *Gregory* (115 F. Supp. 545 (S. D. Cal.)), and *Carson Park Builders* v. *Allen* (S. D. Cal. (Civil No. 15473–WM)).

other laws or regulations * * *" (R. 29). The court below did not pass on this lapse of power contention but stated that the claim appeared to have "* * * substantial merit * * *" (R. 36). Although the point was thus not decided by the court below, we believe it necessary to discuss the matter, in order to show that the case is not moot.[46]

We are here dealing with temporary legislation. Where such legislation expires, the broad principle to be applied is specifically set forth in the General Savings Statute, 1 U. S. C. (Supp. V) 109, namely, that such expiration will not prevent enforcement as to previously incurred liabilities in the absence of an express provision in the temporary legislation to the contrary. Here, as we shall show, there is no such express provision. On the contrary, there is plain indication that Congress contemplated the continuation and completion of enforcement proceedings with regard to price and wage stabilization violations which had allegedly occurred during the substantive control period.

---

[46] Appellant, Phil C. Neal, the Enforcement Commissioner appointed for the taking of evidence in the instant case (*supra*, pp. 12, 14), is now on the staff of the Office of Defense Mobilization, ready to conduct a hearing when and if the injunction is lifted. Accordingly, there is still a party within the jurisdiction of the district court.

BLEED THROUGH

BLURRED COPY

A. THE GENERAL SAVINGS STATUTE

The General Savings Statute provides, in part (1 U. S. C. (Supp. V) 109):

> * * * The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so *expressly* provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. [Italics supplied.]

This language clearly applies to appellee's attempt to escape liability imposed by the Defense Production Act.

The prime purpose of the General Savings Statute is to prevent—in the absence of a deliberate legislative directive—the expiration of a statute from acting as a legislative pardon for violations of duties imposed by the statute. *United States* v. *Allied Oil Corp.*, 341 U. S. 1, 5; *Fleming* v. *Mohawk Co.*, 331 U. S. 111. And this provision extends to liabilities created by regulations issued pursuant to the statute. *United States* v. *Allied Oil Corp.*, 341 U. S. 1, 5; *Fleming* v. *Mohawk Co.*, 331 U. S. 111; *United States* v. *Carter*, 171 F. 2d 530 (C. A. 5); *Bowen* v. *United States*, 171 F. 2d 533 (C. A. 5); cf. *United States* v. *Fortier*, 342 U. S. 160, 161, fn. 3. The policy and purpose of

the statute thus cover precisely the instant controversy.

In the light of the policy and purpose, the statute has been definitively construed on technical points similar to those which appellee raises as objections to its coverage here. Thus, as this Court has recently pointed out, the statute preserves not merely remedies but the necessary means to ascertain and impose the remedy. *De La Rama S. S. Co.* v. *United States,* 344 U. S. 386, 389–390, in which the Court stated:

> This case demonstrates the concrete, dollar-and-cents importance of saving the statute and not merely the liability. Indeed, in this case the liability under the statute is not wholly saved unless that portion of the statute which gives the District Court jurisdiction also survives. * * * where the object of Congress was to destroy rights in the future while saving those which have accrued, to strike down enforcing provisions that have special relation to the accrued right and as such are part and parcel of it, is to mutilate that right and hence to defeat rather than further the legislative purpose.

And the necessary means to enforcement can consist of appropriate administrative proceedings. *National Labor Relations Board* v. *National Garment Co.,* 166 F. 2d 233, 236 (C. A. 8), certiorari denied, 334 U. S. 845; *National Labor Relations Board* v. *Gate City Cotton Mills,* 167 F. 2d 647, 649 (C. A. 5); *National Labor Relations Board* v.

BLEED THROUGH

BLURRED COPY

Edward G. Budd Mfg. Co., 169 F. 2d 571, 575 (C. A. 6), certiorari denied, 335 U. S. 908; *Eastern Coal Corp.* v. *National Labor Relations Board*, 176 F. 2d 131, 137 (C. A. 4).

Finally, the liquidation of the emergency program from which the 1950 Act was derived has been held to allow continuation of administrative enforcement by a successor agency. *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 113–119, in which the successor was held authorized to issue administrative subpoenas after termination of price controls.

Although Title IV of the Defense Production Act contains the wage control provisions which expired on April 30, 1953, and the agencies created under that title were terminated on October 31, 1953, the President has delegated to the Director of the Office of Defense Mobilization their function "of conducting administrative proceedings under Title IV of the Act, including the conclusion of those instituted pursuant to section 405." Executive Order No. 10494, 18 F. R. 6585, October 14, 1953. The existence of the Office of Defense Mobilization does not rest upon the Defense Production Act. The specific statutory provisions utilized in this delegation are contained in Title VII which continues until June 30, 1955. See *infra*, p. 70 *et seq.* The situation is now legally the same as if the President had delegated the tax disallowance functions to the Treasury or any other permanent agency. This method of enabling administrative enforcement proceedings to be completed was authorized by the provision in Sec-

tion 703, which is still in effect, which permits the President to delegate the authority conferred upon him.

For the above reasons, the General Savings Statute, in the absence of any express direction by Congress waiving its provisions, is plainly applicable here, and there is an agency lawfully in existence which has authority to wind up the administrative enforcement program.

B. THERE IS NO EXPRESS DECLARATION BY CONGRESS THAT WAGE STABILIZATION ENFORCEMENT PROCEEDINGS WERE TO LAPSE WITH THE TERMINATION OF THE SUBSTANTIVE CONTROL PROGRAM, NOR IS THERE ANY BASIS FROM WHICH SUCH PURPOSE SHOULD REASONABLY BE INFERRED

As we will show, there has been no express statement of intention by Congress that the winding up of the price and wage stabilization substantive program should act as an automatic pardon with regard to accrued violations. Neither appellee nor the court below has referred to any statute which contains an express provision waiving liability for past unlawful conduct, such as is necessary if the General Savings Statute is not to apply.

Appellee relies upon Section 717 (a) (*infra*, p. 86) which provides that "* * * all authority conferred * * *" under Title IV, the price and wage control title, terminates on April 30, 1953, and Section 717 (b) (3) which provides that any agency created under the Defense Production Act "* * * may be continued in existence for purposes of liquidation for not to exceed six

BLEED THROUGH

BLURRED COPY

months after the termination of the provision authorizing the creation of such agency," *i. e.*, six months after April 30, 1953. But these are general termination provisions which do not contain the express, or even an implied, waiver of liabilities such as is necessary to escape the effect of the General Savings Statute. These provisions do not deal at all with the subject of liability or non-liability for past unlawful conduct.

Appellee also refers to the special savings clause in Section 706 (b), which preserves "* * * any suit, action, or prosecution, whether theretofore or thereafter commenced, with respect to any right, liability, or offense incurred or committed prior to the termination date of such title." Appellee argues that the failure of this provision to mention administrative enforcement proceedings shows that only judicial remedies were intended to be preserved. As we shall show, this clause, read in the light of the background from which it was derived, manifested a contrary intention. But, in any event, it certainly is not an express provision that any past liabilities shall be released, such as is necessary if it is to be read as waiving the application of the General Savings Statute. Read most narrowly, it repeats the provisions of that statute without using quite as broad language, but it does not purport to wipe out *any* liabilities which would be saved by the General Statute.

We shall now explain why we believe that the provisions in question were affirmatively intended

to preserve liabilities enforced in the first instance by administrative action.

a. As in connection with all provisions of the 1950 Act, the savings language of Section 706 (b) must be read in context and in the light of the World War II legislation and experience. Section 1 (b) of the Emergency Price Control Act of 1942, 56 Stat. 23, like Section 706 (b), preserved "* * * any proper suit, action, or prosecution * * *." As we have already shown, Section 5 of the Stabilization Act of 1942, the section covering wage stabilization enforcement during the World War II period and on which Section 405 (b) of the 1950 Act was modeled, was enacted subsequent to, and amendatory of, the price control legislation. The Stabilization Act had no specific savings clause. The savings language available in Section 1 (b) was utilized in Executive Order 9801 (11 F. R. 13435) which, in suspending wage and price controls, specifically preserved "* * * any proper suit, action, or prosecution * * *." Pursuant to this savings language, wage stabilization enforcement, by means of administrative enforcement procedures, was carried on to its completion of 1949. *Annual Report of the Commissioner of Internal Revenue*, 1947, pp. 62–63; *id.*, 1948, pp. 33–34; *id.*, 1949, pp. 26–27.[47]

[47] The tax deduction disallowance function with regard to violations of the World War II wage stabilization program was transferred to the Department of Treasury on December 12, 1946. Section 10 (b) of Executive Order 9809, 11 F. R. 14281.

BLEED THROUGH

BLURRED COPY

As we have already shown, *supra*, pp. 43–45, the 1950 legislation was specifically derived from the 1942 legislation and experience. This, of course, is a factor which strongly underscores the applicability herein of the General Savings Statute. With the 1942 legislation and experience as a model, it must be taken as established that any purpose in Congress to deviate from the familiar pattern of administration would be express. Here, on the contrary, all indications are that Congress intended to follow and permit the same administration. The savings language of Section 706 (b), referred to above, was taken from Section 1 (b) of the 1942 price control legislation. As we have already shown, *supra*, p. 61, Section 706 (b) appeared in the defense production legislation prior to the addition of Title IV which covered price and wage control. Here, as in the 1942 situation where a similar time sequence occurred with regard to Section 5 of the Stabilization Act, no change was made in the savings language. But the omission technically to adjust the savings language of Section 706 (b) so as to spell out coverage of the administrative enforcement procedure made available by Section 405 (b) cannot be taken as any evidence of a congressional intent to differentiate between such enforcement proceedings and those deemed appropriate in price stabilization cases. The history of the language shows that Congress assumed that it would extend to administrative enforcement as well as to strictly judicial remedies.

289139—54——6

b. There is specific evidence to demonstrate congressional understanding that the termination of substantive controls on April 30, 1953, did not cause a lapse of the enforcement power. As we have shown above, at supplemental appropriations hearings held by the Senate Committee on July 23, 1953 and by the House Committee on June 19, 1953, the power to complete the wage stabilization enforcement program was taken for granted. See *supra*, pp. 52–57.[48] And the Senate Committee, in opposing funds for this purpose, *inter alia*, to the Economic Stabilization Agency, indicated beyond question an understanding that the enforcement program was to be completed in its recommendation that pending cases be transferred to the Department of Justice.

c. It has also been suggested that the physical dissolution, on October 31, 1953, of the Economic Stabilization Agency and its component parts, created to correlate the administration of the entire control program during its life, marked the cutoff date for enforcement proceedings. Section 717 (b) (3) provided that any agency created under the Defense Production Act "* * * may be continued in existence for purposes of

[48] It might here be noted that these supplemental appropriations hearings were concerned chiefly with the question of funds for the Economic Stabilization Agency, including funds for the completion of enforcement proceedings, on the assumption that the completion of the enforcement program could be achieved by that Agency before it closed its doors. They probably would have been apart from the injunction suits.

BLEED THROUGH

BLURRED COPY

liquidation for not to exceed six months after the termination of the provision authorizing the creation of such agency", *i. e.*, six months after April 30, 1953.

No necessary relationship exists between the desire of Congress to wind up the elaborate and expensive machinery created to administer the control program and the continuation *vel non* of the power to complete enforcement proceedings with regard to past violations. Here again, reference may be made, in ascertaining congressional purpose, to the World War II experience and to the fact that enforcement functions were carried out after the specially created emergency agencies had been physically dissolved. See Executive Order 9809, December 12, 1946, 11 F. R. 14281, which transferred wage stabilization enforcement to the Treasury and disposed of many other enforcement functions among various other agencies. That the same pattern was expected to be followed in 1953 is specifically evidenced by the supplemental appropriations hearing material to which we had already adverted. *Supra*, pp. 52–57. There, Congress plainly understood that the enforcement program would be completed, if possible, by the Economic Stabilization Agency but, if necessary, by other agencies, for example, by the Department of Justice. *Supra*, p. 56. Reference might also here be made to a statement by Mr. Flemming, testifying in support of the President's request for funds, that, if the Economic Stabilization Agency

was unable to complete the administrative disallowance proceedings, the function of completing them would have to be shifted, after the dissolution of that agency, to some other agency. Hearings before Senate Committee on Appropriations, 83d Cong., 1st Sess., on H. R. 6200, p. 431.

Apart from these considerations, there are clear statutory indications that the power to enforce was not tied to the provision with regard to the physical dissolution of the Economic Stabilization Agency. For example, broad and continuing investigatory powers are granted to the President, in whom the basic power to enforce is lodged, by Section 705, *infra*, pp. 83–84, "* * * while this Act is in effect and *for a period of two years thereafter* * * *", which enable the President to issue regulations or subpoenas, to obtain information or require reports, and to administer oaths and take sworn testimony wherever, in the President's discretion, such action is necessary "* * * to the enforcement * * *" of the Act or regulations or orders issued thereunder. There can be little doubt that this provision itself fully authorizes the President or his agent to conduct the administrative hearings involved in this case. The expiration of the agency specially created to administer the control program during its life meant no more, in the light of this provision, than that the power to enforce reverted to the President. In turn, the President is specifically authorized to delegate that power. Section 703, *infra*, p. 82, which, like Section 705, is presently

BLEED THROUGH

BLURRED COPY

effective,[49] authorizes delegation by the President.

The result reached by this analysis of the pertinent statutory provisions is fully supported by the principles contained in this Court's decisions in the *Allied Oil* and *Mohawk* cases. Absent the specific provisions, the same result would be reached by application of the General Savings Statute. *De La Rama S. S. Co.* v. *United States, supra.* The power to conclude the enforcement program as to price and wage stabilization violations resides in the President and has been exercised by him by means of appropriate delegations. Price enforcement is being processed to completion by the Department of Justice. Wage and salary stabilization enforcement is lodged in the Office of Defense Mobilization. Executive Order 10494, October 14, 1953, 18 F. R. 6585.

CONCLUSION

For the above reasons it is respectfully submitted that the judgment below should be reversed.

ROBERT L. STERN,
Acting Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
SAMUEL D. SLADE,
HERMAN MARCUSE,
Attorneys.
CHARLES H. KENDALL,
General Counsel,
Office of Defense Mobilization.

FEBRUARY 1954.

[49] Both of these sections are preserved in existence until June 30, 1955. See Section 717 (a), *infra*, p. 86.

APPENDIX

1. Section 205 of the Emergency Price Control Act of 1942, 56 Stat. 23, 33, provides in pertinent part:

> (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.
>
> (b) Any person who willfully violates any provisions of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.
>
> (c) The district courts shall have jurisdiction of criminal proceedings for violations

BLEED THROUGH

BLURRED COPY

of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205 (f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

2. The Defense Production Act of September 8, 1950, 64 Stat. 798, as amended by the Defense Production Act Amendments of 1951, 65 Stat. 131, 50 U. S. C. App. Supp. V 2061–2166; of 1952, 66 Stat. 296, and of 1953, 67 Stat. 129, provides in pertinent part:

SECTION 403 (50 U. S. C. APP. (SUPP. V) 2103)

(a) At such time as the President determines that it is necessary to impose price and wage controls generally over a substantial portion of the national economy, he shall administer such controls, and rationing at the retail level of consumer goods for household and personal use under authority of Title I of this Act (when and to the extent that he exercises such authority), through a new independ-

ent agency created for such purpose: *Provided, however,* That the President shall administer any controls over the wages or salaries of employees subject to the provisions of the Railway Labor Act, as amended, through a separate board or panel having jurisdiction only over such employees. Such agency may utilize the services, information, and facilities of other agencies and departments of the Government, but such agency shall not delegate enforcement of any of the controls to be administered by it under this section to any other agency or department.

* * * * * * *

SECTION 404 (50 U. S. C. APP. (SUPP. V) 2104)

In carrying out the provisions of this title, the President shall, so far as practicable, advise and consult with, and establish and utilize committees of, representatives of persons substantially affected by regulations or orders issued hereunder.

SECTION 405 (50 U. S. C. APP. (SUPP. V) 2105)

(a) It shall be unlawful, regardless of any obligation heretofore or hereafter entered into, for any person to sell or deliver, or in the regular course of business or trade to buy or receive, any material or service, or otherwise to do or omit to do any act, in violation of this title or of any regulation, order, or requirement issued thereunder, or to offer, solicit, attempt or agree to do any of the foregoing. The President shall also prescribe the extent to which any payment made, either in money or property, by any person in violation of any such regulation, order, or requirement shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses

BLEED THROUGH

BLURRED COPY

of any such person for the purposes of any other law or regulation, including bases in determining gain for tax purposes.[1]

(b) No employer shall pay, and no employee shall receive, any wage, salary, or other compensation in contravention of any regulation or order promulgated by the President under this title. The President shall also prescribe the extent to which any wage, salary, or compensation payment made in contravention of any such regulation or order shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation.

SECTION 409 (50 U. S. C. APP. (SUPP. V) 2109)

(a) Whenever in the judgment of the President any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 405 of this title, he may make application to any district court of the United States or any United States court of any Territory or other place subject to the jurisdiction of the United States for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the President that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.

[1] The second sentence was added by the Defense Production Act Amendments of 1951, see *supra*, pp. 50, 62–63.

(b) Any person who willfully violates any provision of section 405 of this title shall be guilty of a misdemeanor and shall, upon conviction thereof, be subject to a fine of not more than $10,000, or to imprisonment for not more than one year, or both. Whenever the President has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

(c) * * *

(d) The President shall also prescribe the extent to which any payment made by way of fine pursuant to subsection (b) of this section 409, or any payment made to the United States or to any buyer in compromise or satisfaction of any liability or of any right of action, suit, or judgment, authorized pursuant to subsection (c) of this section 409 for selling any material or service, in violation of a regulation or order providing a ceiling or ceilings, shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any such person for the purposes of any other law or regulation.[2]

(e) * * *

SECTION 703 (50 U. S. C. APP. (SUPP. V) 2153)

(a) Except as otherwise specifically provided, the President may delegate any power or authority conferred upon him by this Act to any officer or agency of the Government, including any new agency or agencies (and the President is hereby authorized to create such new agencies, other than cor-

[2] This paragraph was added by the Defense Production Act Amendments of 1951, see *supra*, pp. 50, 63–64.

BLEED THROUGH

BLURRED COPY

porate agencies, as he deems necessary), and he may authorize such redelegations by that officer or agency as the President may deem appropriate. * * *

SECTION 704 (50 U. S. C. APP. (SUPP. V) 2154)

The President may make such rules, regulations, and orders as he deems necessary or appropriate to carry out the provisions of this Act. Any regulation or order under this Act may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions as in the judgment of the President are necessary or proper to effectuate the purposes of this Act, or to prevent circumvention or evasion, or to facilitate enforcement of this Act, or any rule, regulation, or order issued under this Act. * * *

SECTION 705 (50 U. S. C. APP. (SUPP. V) 2155)

(a) The President shall be entitled, while this Act is in effect and for a period of two years thereafter, by regulation, subpena, or otherwise, to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, and take the sworn testimony of, and administer oaths and affirmations to, any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act and the regulations or orders issued thereunder. The President shall issue regulations insuring that the authority of this subsection will be utilized only after the scope and purpose of the investigation, inspection, or inquiry to be made have been defined by competent

authority, and it is assured that no adequate and authoritative data are available from any Federal or other responsible agency. In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in this subsection, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the President, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) * * *

SECTION 706 (50 U. S. C. APP. (SUPP. V) 2156)

(a) Whenever in the judgment of the President any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the President that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.

(b) The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this Act or any rule, regulation, order, or subpena thereunder, and of all civil actions under this Act to

BLEED THROUGH

BLURRED COPY

enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, order, or subpena thereunder. Any criminal proceeding on account of any such violation may be brought in any district in which any act, failure to act, or transaction constituting the violation occurred. Any such civil action may be brought in any such district or in the district in which the defendant resides or transacts business. Process in such cases, criminal or civil, may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found; the subpena for witnesses who are required to attend a court in any district in such case may run into any other district. The termination of the authority granted in any title or section of this Act, or of any rule, regulation, or order issued thereunder, shall not operate to defeat any suit, action, or prosecution, whether theretofore or thereafter commenced, with respect to any right, liability, or offense incurred or committed prior to the termination date of such title or of such rule, regulation, or order. No costs shall be assessed against the United States in any proceeding under this Act. All litigation arising under this Act or the regulations promulgated thereunder shall be under the supervision and control of the Attorney General.

SECTION 709 (50 U. S. C. APP. (SUPP. V) 2159)

The functions exercised under this Act shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of section 3 thereof. Any rule, regulation, or order, or amendment thereto, issued under authority of this Act shall be accompanied by a

statement that in the formulation thereof there has been consultation with industry representatives, including trade association representatives, and that consideration has been given to their recommendations, or that special circumstances have rendered such consultation impracticable or contrary to the interest of the national defense, but no such rule, regulation, or order shall be invalid by reason of any subsequent finding by judicial or other authority that such a statement is inaccurate.

SECTION 715 (50 U. S. C. APP. (SUPP. V) 2164)

If any provision of this Act or the application of such provision to any person or circumstances shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SECTION 717 (50 U. S. C. APP. (SUPP. V) 2166 AND 67 STAT. 129, 131)

(a) Title I (except section 104), title III, and title VII (except section 714) of this Act, and all authority conferred thereunder, shall terminate at the close of June 30, 1955. Section 714 of this Act, and all authority conferred thereunder, shall terminate at the close of July 31, 1953. Section 104, title II, and title VI of this Act, and all authority conferred thereunder, shall terminate at the close of June 30, 1953. Titles IV and V of this Act, and all authority conferred thereunder, shall terminate at the close of April 30, 1953.

(b) Notwithstanding the foregoing—

(1) * * *

(2) * * *

(3) Any agency created under this Act may be continued in existence for purposes of liquidation for not to ex-

BLEED THROUGH

BLURRED COPY

ceed six months after the termination of the provision authorizing the creation of such agency.

(c) * * *

3. The Regulations of October 27, 1942 (7 F. R. 8748) provide in pertinent part:

§ 4001.2 *Authority of National War Labor Board.* The Board shall, subject to the provisions of sections 1, 2, 3, 4, 8, and 9 of Title II of Executive Order No. 9250, of October 3, 1942, have authority to determine whether any

(a) Wage payments, or

(b) Salary payments to an employee totaling in amount not in excess of $5,000 per annum where such employee

(1) In his relations with his employer is represented by a duly recognized or certified labor organization, or

(2) Is not employed in a bona fide executive, administrative or professional capacity

are made in contravention of the Act, or any rulings, orders or regulations promulgated thereunder. Any such determination by the Board, made under rulings and orders issued by it, that a payment is in contravention of the Act, or any rulings, orders, or regulations promulgated thereunder, shall be conclusive upon all Executive Departments and agencies of the Government in determining the costs or expenses of any employer for the purpose of any law or regulation, either heretofore or hereafter enacted or promulgated, including the Emergency Price Control Act of 1942 or any maximum price regulation thereof, or for the purpose of calculating deductions under the revenue laws of the United States, or for the purpose of deter-

mining costs or expenses under any contract made by or on behalf of the United States. Any determination of the Board made pursuant to the authority conferred on it shall be final and shall not be subject to review by The Tax Court of the United States or by any court in any civil proceedings.

§ 4001.10 *Effect of unlawful payments.* (a) If any wage or salary payment is made in contravention of the Act or the regulations, rulings or orders promulgated thereunder, as determined by the Board or the Commissioner, as the case may be, the entire amount of such payment shall be disregarded by the Executive Departments and all other agencies of the Government in determining the costs or expenses of any employer for the purpose of any law or regulation, including the Emergency Price Control Act of 1942, or any maximum price regulation thereof, or for the purpose of calculating deductions under the revenue laws of the United States, or for the purpose of determining costs or expenses of any contract made by or on behalf of the United States. The term "law or regulations" as used herein includes any law or regulation hereafter enacted or promulgated. In the case of wages or salaries decreased in contravention of the Act or regulations, rulings or orders promulgated thereunder, the amount to be disregarded is the amount of the wage or salary paid or accrued. In the case of wages or salaries increased in contravention of the Act or regulations, rulings or orders promulgated thereunder, the amount to be disregarded is the amount of the wage or salary paid or accrued and not merely an amount representing an increase in such wage or salary.

BLEED THROUGH

BLURRED COPY

In the case of a salary in excess of the amount allowable under § 4001.9 which is paid or accrued to an employee during his taxable year in contravention of the Act or regulations, rulings or orders promulgated thereunder, the amount to be disregarded is the full amount of such salary and not merely the amount representing the excess over the amount allowable under such § 4001.9.

(b) Payments made or received in violation of any regulations, rulings or orders promulgated under the authority of the Act are subject to the penal provisions of the Act.

4. Economic Stabilization Agency General Order No. 15, 17 F. R. 2994, as amended November 4, 1952, 17 F. R. 9977, provides:

AUTHORITY: Sections 1 to 5 issued under sec. 704, 64 Stat. 816, as amended; 50 U. S. C. App. Sup. 2154. Interpret or apply Title IV, 64 Stat. 803, as amended; 50 U. S. C. App. Sup. 2101–2110, sec. 703, 64 Stat. 816, as amended; 50 U. S. C. App. Sup. 2153; E. O. 10161, Sept. 9, 1950, 15 F. R. 6105; 3 CFR, 1950 Supp.; E. O. 10281, Aug. 28, 1951, 16 F. R. 8789; 3 CFR 1951 Supp.

SECTION 1 *Purpose.* Pursuant to the Defense Production Act, as amended, and Executive Order 10161, as amended, this order sets forth policy and procedure with respect to disallowances and clarifies the respective functions of the Economic Stabilization Administrator and the constituent organizations of the Economic Stabilization Agency in determining disallowances under Title IV of the act, as amended.

SEC. 2 *Authority of the Director of Price Stabilization.* (a) The Director of Price Stabilization has authority to deter-

mine whether any person has made any payment either in money, or property, or other consideration in violation of the act or of any regulation, order or requirement relating to prices under the act. Where such determination has been made, the Director has authority further to determine the amount of such payment to be disregarded and disallowed for the purposes listed in section 4 (a).

(b) In the case of payments by any person by way of fine for violation of the act, or by way of compromise or satisfaction of any liability, right of action, suit or judgment for violation of a price regulation or order under the act, the Director shall further determine the amount of such payment to be disallowed and disregarded and the purpose or purposes for which it shall be disallowed listed in section 4 (a).

(c) In determining such amount to be disallowed and disregarded, extenuating and mitigating circumstances of the character described in section 4 (b) may be taken into consideration.

SEC. 3 *Authority of the Wage Stabilization Board, Office of Salary Stabilization, and the Railroad and Airline Wage Board.* The National Enforcement Commission, created by General Order 18 of the Economic Stabilization Agency, issued July 28, 1952 (17 F. R. 6925), has authority, with respect to persons within the jurisdiction of the Wage Stabilization Board, the Salary Stabilization Board and the Office of Salary Stabilization, and the Railroad and Airline Wage Board, to determine whether any wage, salary, or other compensation has been paid or accrued, at any time, in violation of any provision of the Defense Production Act of 1950, as

BLEED THROUGH

BLURRED COPY

amended, or any regulation or order or directive heretofore or hereafter promulgated under the act, or any regulation or order or directive heretofore or hereafter promulgated into the act, and further to determine the amount of payments or accruals to be disregarded and disallowed for the purposes enumerated in section 4 (a) below. Such determination shall be made by the Commission after any of the foregoing named constituent organizations of this Agency have instituted an enforcement proceeding before it or after any such organization has submitted a settlement proposal to the Commission for its approval. Extenuating and mitigating circumstances of the character described in section 4 (b) may be considered in determining the amount to be disallowed and disregarded.

SEC. 4 *Disallowance policy*—(a) *Purposes of disallowance.* The disallowances under the authority granted by sections 2 and 3 may be made for one or more of the purposes of:

(1) Calculating deductions or the basis for determining gain under the Revenue Laws of the United States;

(2) Determining costs and expenses under any contract made by or on behalf of the United States, either directly or indirectly;

(3) Establishing any maximum price pursuant to the act; and

(4) Determining the costs or expenses of any person for the purpose of any other law or regulation, whether heretofore or hereafter promulgated.

(b) *Amounts of disallowance and extenuating circumstances.*

(1) The amount paid or accrued in violation of the act or regulations, orders or determinations made thereunder which may be disallowed and disregarded shall be the entire amount of the wage, salary or other compensation paid or accrued, or the entire amount of the payment either in money or property or other consideration, and not merely the amount paid or accrued in excess of the legal maximum of such wage, salary, other compensation, or payment. Where extenuating and mitigating circumstances exist, of the character described in the following paragraph, less than the entire amount of such payments or accruals may be disregarded and disallowed; provided that the usual and general policy shall be to disallow an amount at least equal to that portion of any payment or accrual in excess of whatever payment was permissible under the governing regulation, order or determination.

(2) Extenuating and mitigating circumstances which may be taken into account include:

(i) Prompt and voluntary disclosure of possible violation;

(ii) Prompt and full cooperation with investigating and other officials;

(iii) Prompt remedying of violation of applicable rules, regulations, or orders;

(iv) The adoption of prompt and adequate measures to prevent repetition of any violation of applicable rules, regulations or orders;

(v) Inadvertent rather than intentional and willful violations;

(vi) Such other factors as may be appropriate in the particular case.

BLEED THROUGH

BLURRED COPY

SEC. 5 *Authority to issue rules, regulations and orders.* The Director of Price Stabilization, the Wage Stabilization Board, the Office of Salary Stabilization, and the Railroad and Airline Wage Board, as the case may be, or their respective designees, subject to the supervision and direction of the Economic Stabilization Administrator, may issue such rules, regulations, and orders, consistent with this order, which they deem necessary to carry out the provisions of this authority.

SEC. 6 *Transmittal of determination to appropriate governmental agencies.* The Director of Price Stabilization and the National Enforcement Commission shall certify and forward their final determination in each case to the appropriate governmental agency or agencies. Any such determination shall be conclusive on all Executive Departments and agencies of the Government, and they shall disregard and disallow the amounts thus certified. Any determination made pursuant to this authority under the Defense Production Act, as amended, shall be final and not subject to review by The Tax Court of the United States or by any court in any civil proceeding.

SEC. 7 *Effect on other orders.* Any orders or parts of orders, the provisions of which are inconsistent with the provisions of this order are hereby superseded or amended accordingly.

SEC. 8 *Approval of prior actions.* All action heretofore taken by the constituent organizations or their respective designees under prior rules, regulations, and orders with respect to disallowances is approved.

5. Economic Stabilization Agency General Order No. 18, 17 F. R. 6925, as amended November 4, 1952, 17 F. R. 9977, provides:

> SECTION 1 *Purpose.* (a) The purpose of this order is to establish a National Enforcement Commission within the Economic Stabilization Agency and to define its functions.
>
> SEC. 2 *Legal basis and authority.* (a) This order is promulgated under the authority vested in the Economic Stabilization Administrator by the Defense Production Act of 1950, as amended (Pub. Law 774, 81st Cong., Pub. Laws 96 and 429, 82nd Cong.), Executive Order 10161, as amended, Executive Order 10182, and Executive Order 10205.
>
> SEC. 3 *Organization*—(a) *National Enforcement Commission.* The National Enforcement Commission is hereby established within the Economic Stabilization Agency. The Commission shall consist of three public members and two alternate public members appointed by the Administrator. One of the three public members shall be designated as Chairman. The Chairman shall be assisted by a Counsel to the Commission, who may be one of the two alternate public members and who shall be in charge of the administrative functions of the Commission in the absence of the Chairman.
>
> SEC. 4 *Functions of the National Enforcement Commission.* (a) The functions of the National Enforcement Commission (hereinafter referred to as the Commission) shall be, with respect to persons within the jurisdiction of the Wage Stabilization Board, the Salary Stabilization Board and the Office of Salary Stabiliza-

BLEED THROUGH

BLURRED COPY

tion, and the Railroad and Airline Wage Board, to determine whether any wage, salary, or other compensation has been paid or accrued, at any time, in violation or contravention of any provision of the Defense Production Act of 1950, as amended, or any regulation or order or directive heretofore or hereafter promulgated under the act. Such determination shall be made by the Commission after any of the foregoing named constituent organizations of this Agency have instituted an enforcement proceeding before it or after any such organization has submitted a settlement proposal to the Commission for its approval. Such determination shall be final within the Economic Stabilization Agency.

(b) The Commission is further authorized to certify and transmit such determinations in accordance with the policy and procedure set forth in Economic Stabilization Agency General Order No. 15, and other orders, directives, general policies or general regulations of the Economic Stabilization Administrator.

SEC. 5. *Redelegation of authority.* (a) The authority delegated to the Economic Stabilization Administrator with respect to the imposition of disallowance sanctions under section 405 (b) of the Defense Production Act, as amended, for the violation or contravention of any provisions of, or any orders or any regulations issued under said act, as amended, relating to the payment of wages, salaries, or other compensation, is hereby redelegated to the Commission, in accordance with the functions described above.

(b) The Wage Stabilization Board, the Salary Stabilization Board and the Office of Salary Stabilization and the Railroad and

Airline Wage Board are hereby directed to delegate effective immediately any subsidiary authority necessary on their part to carry out the foregoing delegations.

SEC. 6 *Tranfer of cases, proceedings, records, property and personnel.* (a) All the cases and proceedings presently pending before the National Enforcement Commission or its Regional Enforcement Commissions previously established under the Wage Stabilization Board are hereby transferred to the Commission established by this order.

(b) All records pertaining to the foregoing cases and proceedings, as well as the property and personnel of the National Enforcement Commission previously established under the Wage Stabilization Board, are also hereby transferred to the Commission.

(c) All the prior decisions and certifications of the National Enforcement Commission previously established by the Wage Stabilization Board are hereby continued in full force and effect.

SEC. 7 *Administrative services.* (a) The Commission shall share the administrative service facilities of the Wage Stabilization Board relating to budget, fiscal, personnel, supply, space, and other administrative management matters.

SEC. 8 *Effect on other orders.* (a) General Orders Nos. 15 and 16 and General Order No. 8, Revised, are hereby specifically superseded, and amended accordingly, to the extent that they are inconsistent herewith. However, nothing contained herein shall be construed to limit the prosecution and investigative functions of the Wage Stabilization Board, the Salary Stabilization Board and the Office of Salary Stabilization, and

BLEED THROUGH

BLURRED COPY

the Railroad and Airline Wage Board relating to enforcement, delegated in General Order 15, as amended, 16, and 8, Revised. Any other orders and regulations or parts of orders and regulations the provisions of which are inconsistent with the provisions of this order are hereby superseded and amended accordingly.

SEC. 9 *Effective rate.* (a) This order shall become effective at the close of the 29th day of July, 1952, commencing with the 30th day of July, 1952.

6. Wage Stabilization Board General Procedural Regulation of September 20, 1951, 16 F. R. 10018, as revised August 21, 1952, 17 F. R. 7737, provides in pertinent part:

SECTION 1.1 *Enforcement proceedings.* Whenever it has been determined that any wage, salary, or other compensation has been paid in contravention of the regulations and orders issued or promulgated under the act, the extent to which any such wage, salary, or other compensation payment shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation shall be prescribed in accordance with the provisions of section 405 (b) of the act. Any wage, salary, or other compensation paid in contravention of the regulations and orders issued or promulgated under the act may be disallowed in whole or in part for one or more of the following purposes:

(a) Calculating deductions or the basis for determining gain under the Revenue Laws of the United States;

(b) Determining costs and expenses under any contract made by or on behalf of

the United States, either directly or indirectly;

(c) Establishing any maximum price pursuant to the act; and

(d) Determining the costs or expenses of any person for the purpose of any other law or regulation.

SEC. 1.2 *Institution of enforcement proceedings.* Whenever the Office of Salary Stabilization, the Wage Stabilization Board, or the Railroad and Airline Wage Board has reason to believe that any person has paid wages, salaries, or other compensation in contravention of the act or regulations and orders issued or promulgated pursuant thereto or determinations made thereunder, such Board or office may institute an enforcement proceeding to ascertain whether a contravention has occurred and to determine the amount to be certified to and disregarded by the executive departments and other government agencies.

* * * * *

SEC. 2.3 *Hearings.* (a) The hearing for the purpose of taking evidence upon the issues raised by the parties' pleadings shall be conducted by an Enforcement Commissioner. Enforcement Commissioners shall be appointed by the Economic Stabilization Administrator and shall be designated by the Chairman of the National Enforcement Commission for hearing assignments. For cause, an Enforcement Commissioner may be designated to take the place of the Enforcement Commissioner previously designated to conduct the hearing. Such hearings shall be public unless otherwise ordered by the National Enforcement Commission or by the Enforcement Commissioner presiding at the hearing.

(b) Upon the expiration of the time within which the respondent must answer,

BLEED THROUGH

BLURRED COPY

the National Enforcement Commission shall, as soon as possible, designate an Enforcement Commissioner for the hearing, fix the time and place of hearing and shall give not less than 15 days' written notice thereof to the parties. The notice shall set forth (1) the time and place of the hearing; (2) that the respondent has the right to a hearing before an Enforcement Commissioner, as provided in paragraph (a) of this section; (3) that at such hearing the respondent may be represented by counsel or other representative and will be given reasonable opportunity to present testimony and evidence and to examine and cross-examine witnesses on all matters relating to the allegations of the complaint; and (4) the name and post office address of the designated Enforcement Commissioner.

* * * * *

FINDINGS AND DETERMINATION; RECORD

SEC. 4.1 *Findings and determination of Enforcement Commissioners.* (a) Proposed findings of fact and a recommended determination, as well as briefs in support thereof, may be submitted to the Enforcement Commissioner by any party within 15 days after the conclusion of the hearing or such additional time as the Enforcement Commissioner may prescribe at the conclusion of the hearing.

(b) As soon as feasible after the conclusion of the hearing, the Enforcement Commissioner shall make his findings and determination.

(c) The findings and determination of the Enforcement Commissioner shall be in writing. If, upon the entire record of the case, the Enforcement Commissioner finds that any wage, salary, or other compensation

payment has been made in contravention of the act and the regulations or orders issued thereunder, he shall determine the amount to be disregarded or disallowed, the purpose or purposes for which such amount shall be disregarded or disallowed, and by what departments or government agencies such amount shall be disregarded or disallowed.

(d) In determining costs or expenses to be disregarded or disallowed, the Enforcement Commissioner shall comply with the provisions of General Order 15, Economic Stabilization Administrator.

(e) The Enforcement Commissioner shall file the original and two copies of his findings and determination with the National Enforcement Commission and cause a copy thereof to be served upon each of the parties. Upon the filing of the findings and determination, the case will be transferred to the National Enforcement Commission. Service of the findings and determination shall be complete upon mailing.

(f) If no appeal is filed as hereinafter provided, the findings and determination of the Enforcement Commissioner shall, in the absence of clear and prejudicial error, be adopted by the National Enforcement Commission and a certificate of disallowance based thereon issue to the appropriate departments or agencies of the government.

SEC. 4.2 *Record.* The complaint and any amendments thereto, notice of hearing, order designating Enforcement Commissioner, answer and any amendments thereto, motions, rulings, orders, and stenographic report of the hearing, stipulations and exhibits, and such other documents as the Enforcement Commissioner may deem proper, together with the findings and determination of the Enforcement Commis-

BLEED THROUGH

BLURRED COPY

sioner, shall constitute the record in the case.

APPEALS

SEC. 5.1 *Appeals to the National Enforcement Commission*—(a) *Right of appeal.* Any party may appeal to the National Enforcement Commission from the findings and determination of the Enforcement Commissioner.

(b) *Form and contents of appeal.* The appeal shall be in writing and shall state specifically the objections to the findings and determination from which the appeal is taken. No new evidence shall be considered on appeal.

(c) *Time and place of filing appeals.* An appeal may be taken within 30 days after service on the parties of the findings and determination. The appeal and the original and two copies of any memorandum or brief in support thereof shall be filed with the National Enforcement Commission, Washington 25, D. C., and a copy thereof shall be served upon each of the other parties. If timely request is made to the National Enforcement Commission, the time for filing an appeal and such memorandum or brief may be extended. The extension of time for filing such an appeal and such memorandum or brief is solely within the discretion of the National Enforcement Commission.

(d) *Submission of briefs on appeal.* Within 10 days after the filing of an appeal any other party may file a memorandum or brief with respect to any issues raised by the appeal. The original and two copies of any such memorandum or brief shall be filed with the National Enforcement Commission and a copy thereof

shall be served upon each of the other parties.

(e) *Oral argument on appeal.* The appellant may request oral argument on appeal at the time of the filing of the appeal. Any other party may request oral argument within 10 days after the filing of the appeal. Such requests shall be in writing and shall be addressed to the National Enforcement Commission. The National Enforcement Commission shall give timely notice in writing of its action on the request for oral argument to all parties.

SEC. 5.2 *Decision on appeal.* (a) The National Enforcement Commission shall render its decision upon the entire record of the case including the record presented to the Enforcement Commissioner at the hearing, the findings and determination of the Enforcement Commissioner, and any memoranda or briefs submitted in connection with the appeal by any of the parties. The National Enforcement Commission may affirm, modify, or reverse the findings and determination of the Enforcement Commissioner in whole or in part, may remand the case for further hearing, or may dismiss the complaint.

(b) Copies of the findings and determination shall be sent to the respondent by registered mail, and copies shall be mailed to each other party. Within 10 days after such mailing, upon notice to the other parties, any party may petition the National Enforcement Commission for reconsideration of its findings and determination. The National Enforcement Commission shall give notice in writing to all parties of its action on such petition.

BLEED THROUGH

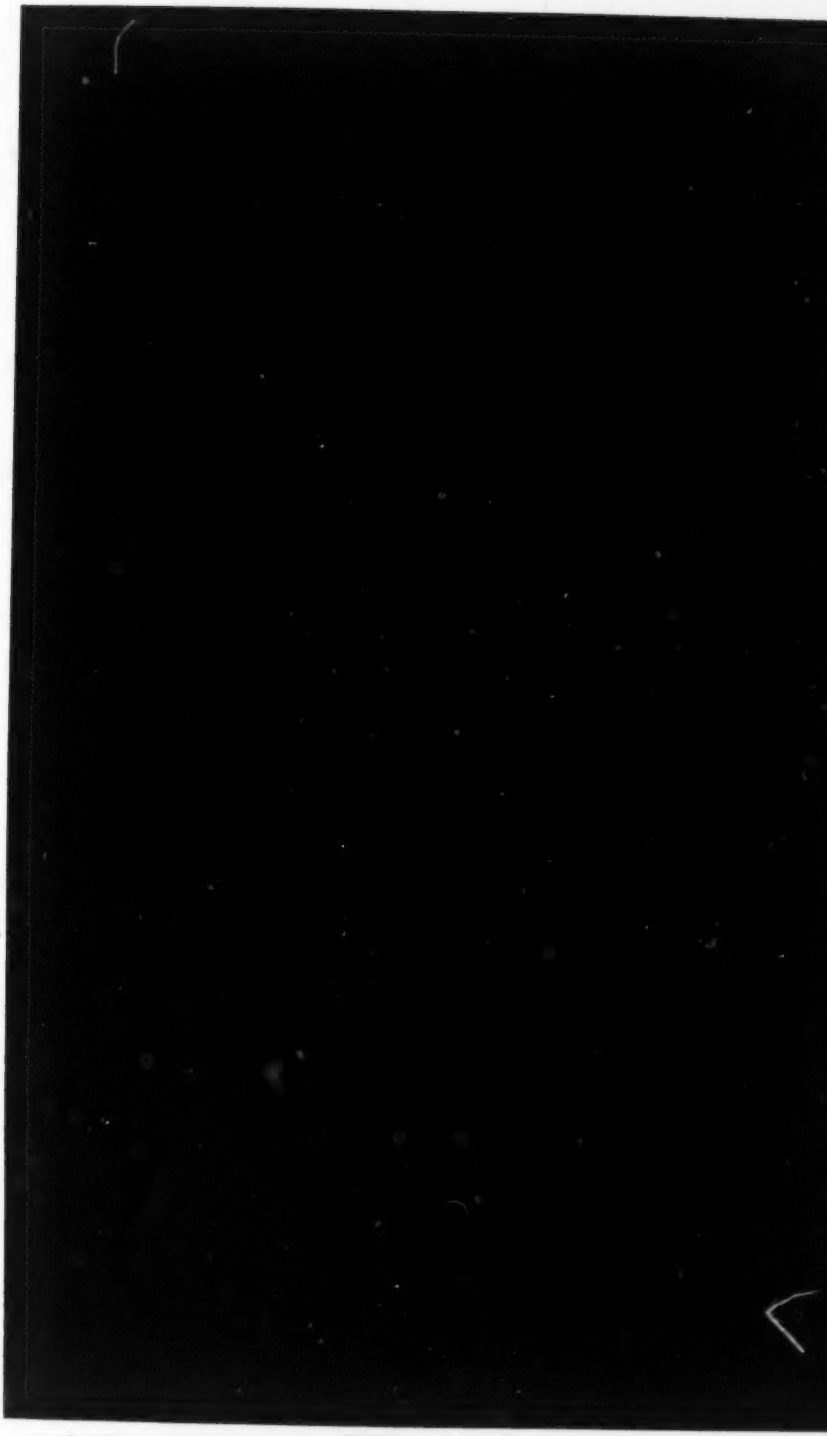
BLURRED COPY

(c) The findings and determination of the National Enforcement Commission shall be final.

CERTIFICATES

SEC. 6.1 *Certificate of disallowance.* Whenever there has been a final decision in an enforcement proceeding imposing a disallowance sanction, as defined in section 1.1 of this regulation, the National Enforcement Commission shall issue a Certificate of Disallowance setting forth the name and address of the respondent or respondents and the amount which shall be disallowed and disregarded by any Executive Department or other agency or departments or agencies of the government in determining the costs and expense of the respondent. The certificate of disallowance shall be transmitted by the National Enforcement Commission to the appropriate Executive Departments or other agencies of the government and a copy served upon the appropriate board or office and the respondent. The certificate of disallowance shall be conclusive for the purposes stated therein.

U. S. GOVERNMENT PRINTING OFFICE: 1984



BLEED THROUGH

BLURRED COPY

INDEX

	Page
I. The finding that the continuation of the administrative proceedings would have caused appellee's credit to be shut off and would disable it from continuing its operations is not supported by the evidence	3
II. Neither the statute nor the Constitution are violated by construing Section 405 (b) to permit maximum disallowances as great as the entire unauthorized payroll	10
A. Section 405 (b) authorizes the disallowance of the entire illegal payroll, not merely of the unauthorized portion of the wages	11
1. Section 405 (b) is substantially identical with Section 5 of the Stabilization of 1942, which, as Congress knew, had been construed as authorizing the disallowance of the entire unauthorized payroll	12
a. The administrative practice under Section 5 of the Stabilization Act of 1942	12
b. Congressional acceptance of this administrative interpretation of Section 405 (b)	16
2. Events following the enactment of the Defense Production Act of 1950 indicate Congressional adherence to the interpretation permitting disallowance of the entire illegal payroll	19
B. The statutory disallowance scheme is not unconstitutional	22
III. No improper delegation of legislative power is contained in the statutory scheme of wage stabilization enforcement established by Section 405 (b)	25
A. Congress may utilize administrative procedure to impose the disallowance sanction	25
B. Section 405 (b) provides sufficient guidance as to the sanction to be imposed	27

291511—54——1

Page

IV. The disallowance sanction is not in conflict with the requirement of Art. I, Section 9, of the Constitution that all direct taxes not covered by the Sixteenth Amendment be apportioned 31
1. An income tax is not a direct tax to the extent that it is based upon business income .. 32
2. The granting of deductions for business expenses is completely within legislative control 34
V. The absence of recitals as to industry consultation does not affect the validity of the instant procedural regulations 37
VI. The resignation in December, 1952, of the industry members of the Wage Stabilization Board has no relationship to this proceeding 42
VII. The regulations are not invalid as retroactive 45
Conclusion 47

CITATIONS

Cases:

American Power Co. v. *S. E. C.*, 329 U. S. 90 28
Beacon Marine Co., In re (Ocean Marine Repairs, Inc.), Labor Relations Reporter Binder 7, WHM 100:1200 ... 11
Boz Inc., In re, June 29, 1952, Bureau of National Affairs, Labor Relations Reporter Binder 7, WHM 100:1167 21
Brushaber v. *Union Pacific R. R.*, 240 U. S. 1 33
Commissioner v. *Flowers*, 326 U. S. 465 ..... 19, 30
Commissioner v. *Weisman*, 198 F. 2d 221 36
Continental Can Co. In re, Labor Relations Reporter Binder 7, WHM 100:1198 11
Cosden Petroleum Corp., 16 Labor Relations Reporter 741 (June 30, 1945) 14
Deputy v. *du Pont*, 308 U. S. 488 34
Doyle v. *Mitchell Bros., Inc.*, 247 U. S. 179 35
Estep v. *United States*, 327 U. S. 114 27
Flint v. *Stone Tracy Co.*, 220 U. S. 107 33
Glascote Products Co., In re, June 3, 1952, Bureau of National Affairs, Labor Relations Reporter Binder 7, WHM 100:1164 21
Grand Central Aircraft Co., Inc. and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (UAW–CIO), Region 6, In the Matter of, Case No. 21–CA–1101, 103 N. L. R. B. No. 101 2
Grand Central Aircraft Co., Inc. (Employer) and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (UAW–CIO) (Petitioner), In the Matter of, Case No. 21–RC–1813, 103 N. L. R. B. No. 101 2

BLEED THROUGH

BLURRED COPY

Cases—Continued

	Page
Hampton & Co. v. *United States*, 276 U. S. 393	28
Hedin Construction Co., In re, April 11, 1952, Bureau of National Affairs, Labor Relations Reporter Binder 7, WHM 100:1153	21
Helvering v. *Bankline Oil Co.*, 303 U. S. 362	34, 36
Helvering v. *Winmill*, 305 U. S. 79	19, 20
Hirabayashi v. *United States*, 320 U. S. 81	31
Hofferbert v. *Anderson Oldsmobile, Inc.*, 197 F. 2d 504	36
Howard Menu Service, 13 Labor Relations Reporter 687 (January 28, 1944)	14
Interstate Transit Lines v. *Commissioner*, 319 U. S. 590	34
Lichter v. *United States*, 334 U. S. 742	27, 28, 31
Lilly v. *Commissioner*, 343 U. S. 90	35
McDonald v. *Commissioner*, 323 U. S. 57	34
Missouri Pacific Railway Co. v. *Tucker*, 230 U. S. 340	23
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41	3
New Colonial Tea Co. v. *Helvering*, 292 U. S. 435	34
Norfolk-Newport News Contractors', 15 Labor Relations Reporter 237 (October 14, 1944)	14
Norman-Frank, Inc. v. *Arnall*, 196 F. 2d 502	41
Norwegian Nitrogen Co. v. *United States*, 288 U. S. 294	19, 30
Oceanic Navigation Co. v. *Stranahan*, 214 U. S. 320	27
Opp Cotton Mills v. *Administrator*, 312 U. S. 126	28
Oval & Koster, 16 Labor Relations Reporter 741 (June 30, 1945)	14
Parker Appliance Co., 13 Labor Relations Reporter 582 (Regional Board Decision)	14
Parkland Sportswear Co., 13 Labor Relations Reporter 503 (December 1, 1943)	14
Passavant v. *United States*, 148 U. S. 214	27
Pollack v. *Farmers' Loan & Trust Co.*, 158 U. S. 601	32
St. Louis, Iron Mountain & Southern Railway Company v. *Williams*, 251 U. S. 63	23
Southwestern Tel. and Tel. Co. v. *Danaher*, 238 U. S. 482	24
Spaulding v. *Douglas Aircraft Co.*, 154 F. 2d 419	31
Stanton v. *Baltic Mining Co.*, 240 U. S. 103	33, 36
Stratton's Independence v. *Howbert*, 231 U. S. 399	33, 36
Sullenger, Lela, 11 T. C. 1076	36
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381	28
Switchmen's Union v. *Mediation Board*, 320 U. S. 297	27
Textile Mills v. *Commissioner*, 314 U. S. 326	35
United States v. *Biwabik Mining Co.*, 247 U. S. 116	36
United States v. *Ju Toy*, 198 U. S. 253	27
United States v. *Rock Royal Co-op.*, 307 U. S. 533	28
Von Baumbach v. *Sargent Land Co.*, 242 U. S. 503	36
Wadley Southern R. Co. v. *Georgia*, 235 U. S. 651	24

Cases—Continued Page

Weather-Seal Manufacturing Co. v. *Commissioner*, 16 T. C. 1312, affirmed without opinion, 199 F. 2d 376 ..... 35, 37
White v. *United States*, 305 U. S. 281 34
Woodworth, N. A. v. *Kavanagh*, 102 F. Supp. 9, affirmed on the opinion of the District Court, 202 F. 2d 154 35
Yakus v. *United States*, 321 U. S. 414 28
Zehrig, J. C., 16 Labor Relations Reporter 742 (June 30, 1945) 14

Constitution, Orders, Regulations and Statutes:
Constitution of the United States, Art. I, Section 9 32
Sixteenth Amendment 32
Executive Order No. 9322 of March 26, 1943 (8 F. R. 3807) 14
Executive Order No. 9334 of April 19, 1943 (8 F. R. 5423) 14
Executive Order No. 10434 (18 F. R. 809) 45
General Order No. 15, Section 4 (b) 5, 20, 38
General Order No. 18 38
General Order No. 19 (17 F. R. 11368) 42
Enforcement Regulation No. 1, 16 F. R. 6028 ..... 20, 38
General Wage Stabilization Regulation No. 1, 16 F. R. 816 46
National War Labor Board Regulations of September 15, 1944, Section 802.73 (c), 9 F. R. 11422 14
Office of Economic Stabilization Regulations:
October 27, 1942, 7 F. R. 8748:
Section 4001.4 15
Section 4001.10 ..... 12, 13, 15
Section 4001.10, superseded October 1, 1943, 8 F. R. 11960 13
As amended November 30, 1942:
Section 4001.5, (a), 7 F. R. 10024 14
As amended November 30, 1944:
Section 4001.15, 9 F. R. 14547 13
Revised General Procedural Regulation No. 1 38
T. D. 5186 of December 2, 1942, Section 102.28, 7 F. R. 10056 15
T. D. 5243 of March 12, 1943, 8 F. R. 3158 15
T. D. 5435 of February 2, 1945, Section 1002.28, 10 F. R. 1475 15
T. D. 5446 of March 17, 1945, 10 F. R. 3008 15
Treasury Regulations 111, Section 29.23a–16, 26 C. F. R. 29.23a–16 ..... 15, 19
War Food Administration Regulations of January 17, 1944, Section 1100.15, 9 F. R. 659 15
War Food Administration Regulations of June 23, 1945, Section 1100.15, 10 F. R. 7615 15

BLEED THROUGH

BLURRED COPY

Constitution, Orders, Regulations and Statutes—Continued

	Page
Defense Production Act of 1950:	
Section 403 (b)	40, 43
Section 404	41
Section 405 (b)	11, 19, 23, 29, 44
Section 703	44
Section 709	37, 38, 41
Section 715	11
Defense Production Act Amendments of 1951	21, 37
Defense Production Act Amendments of 1952	21
Emergency Price Control Act of 1942:	
Section 2 (a) (50 U. S. C. App. 902 (a))	40
Internal Revenue Code, Sec. 23 (a) (1) (A)	34
Stabilization Act of October 2, 1942:	
Section 5	19, 29
Miscellaneous:	
96 Cong. Rec. 12176	38
96 Cong. Rec. 14064–14065	38
97 Cong. Rec. 8555	20
Federal Rules of Civil Procedure, Rule 52	3
Hearings before the Committee on Banking and Currency, United States Senate, 79th Cong., 1st Sess., on S. J. Res. 30, p. 216	18
Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 78th Cong., 2d Sess., on the National War Agencies Appropriations Bill for 1945, pp. 240–241	16, 17
Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 79th Cong., 1st Sess., pp. 12–13	18, 19
Hearings before a Subcommittee of the Committee on Appropriations, United States Senate, 78th Cong., 2d Sess., on H. R. 4879, pp. 132–133	17
National Wage Stabilization Board, The, January 1, 1946–February 24, 1947, pp. 230–231	13
S. Rept. 2250, 81st Cong., 2d Sess.:	
p. 38	26
p. 39	12
Termination Report of the National War Labor Board, Vol. I, pp. 435–436; Vol. II, p. 749	13



BLEED THROUGH

BLURRED COPY

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 450

ARTHUR P. ALLEN, CHAIRMAN, TWELFTH REGION WAGE STABILIZATION BOARD, ET AL., APPELLANTS

v.

GRAND CENTRAL AIRCRAFT CO., A CALIFORNIA CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR APPELLANTS

In our main brief, we have discussed the three points necessarily before the Court on this appeal. We have there argued: (1) that the court below lacked equitable powers to enjoin, in view of the well established doctrines of exhaustion of remedy and prematurity; (2) that Section 405 (b) of the Defense Production Act of 1950 provides an administrative means of enforcement of wage stabilization regulations; and (3) that the power to conduct administrative enforcement proceedings continues. The first two of these points were de-

cided, adversely to the Government, by the court below. The third point is important in connection with possible contentions as to the mootness of the cause.

The court below noted (R. 35–36) that appellee had raised other defenses on which it did not pass.[1] Appellee presents these contentions to the Court as additional grounds for sustaining the decision below (Appellee's Brief, pp. 67–90). This brief will deal with these arguments, and show that they are without merit. First, however, we will revert to an aspect of the exhaustion of remedy point upon which we did not elaborate in our main brief, but which now becomes appropriate for discussion in view of certain overstatements of the evidence made by appellee (Appellee's Brief, pp. 9, 19, 91, 97).

[1] In view of the intimations in appellee's brief (pp. 10, 54), that the wage increases here involved were "merit" increases, or increases given "under pressure from their employees or their union representatives", attention is called to the Decision and Order of the National Labor Relations Board in *In the Matter of Grand Central Aircraft Co., Inc. and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (UAW–CIO), Region 6*, Case No. 21–CA–1101, and *In the Matter of Grand Central Aircraft Co., Inc. (Employer) and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (UAW–CIO) (Petitioner)*, Case No. 21–RC–1813, 103 N. L. R. B. No. 101, presently pending on review in the Ninth Circuit. The Board found that the principal wage increases here involved were unfair labor practices because granted in order to induce the employees to oppose representation by the complaining union.

BLEED THROUGH

BLURRED COPY

I. THE FINDING THAT THE CONTINUATION OF THE ADMINISTRATIVE PROCEEDINGS WOULD HAVE CAUSED APPELLEE'S CREDIT TO BE SHUT OFF AND WOULD DISABLE IT FROM CONTINUING ITS OPERATIONS IS NOT SUPPORTED BY THE EVIDENCE

The court below found (R. 37) that

> * * * the continuance of the threatened administrative proceedings will cause plaintiff's bank credit to be shut off and will disable plaintiff [appellee] from continuing its operations.

Although this finding of fact has no support in the undisputed evidence and is thus not protected by Rule 52, Federal Rules of Civil Procedure, we did not argue the evidentiary point in our main brief,[2] but directed our discussion to the legal issues of general importance which would resolve the questions raised in the entire group of cases of which this is representative. However, in its effort to distinguish this case from *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, appellee has placed such stress on this finding, and so overstated the evidence on which it was based, that it has become imperative to challenge the pertinent finding of fact and to reduce the pertinent evidence to its proper proportions. If the evidence is insufficient to support

[2] The Government had assigned as error the district court's finding of irreparable injury, of which this was a part. See Assignment of Error No. 2, R. 38, Specification of Error No. 1, Main Brief, p. 15.

this finding, appellee's argument on irreparable injury in large part disappears. But even if the finding is allowed to stand, the underlying evidence is significant as indicating how speculative a showing of injury would be sufficient to escape from the exhaustion rule. At the very least, the finding must be interpreted in the light of the undisputed evidence on which it rested.

Actually the evidence, far from establishing that the continuance of the proceedings would cause the shutting off of appellee's bank credit, shows that the bank loans had been renewed once before during the pendency of the proceedings; that the holding of the hearing by the Enforcement Commissioner would not affect the bank's credit policy; that the bank might change the terms of the credit *if* the Enforcement Commissioner should recommend a high disallowance figure and if the chances of a modification by the National Enforcement Commission were slight; and above all that in no circumstances would the bank "take injurious action and deliberately wipe a company out" (R. 71). The evidence in question is that of Mr. Lawler, executive vice-president and a member of the loan committee of the Farmer's and Merchant's National Bank of Los Angeles; it comprises only 11 pages of the record (R. 62–72).

Upon direct examination (R. 62–64), Mr. Lawler testified that his bank and two other banks

BLEED THROUGH

BLURRED COPY

extended a substantial credit to appellee which was up for renewal on September 30, 1953; that generally speaking his recommendations were usually and normally followed by the Board of Directors (R. 62–63); and that his recommendation for a renewal of the loan would be negative *if* the Enforcement Commissioner should recommend a disallowance of any amount between $5,000,000 and $750,000 (R. 63–64).[3] Mr. Lawler stated that "*if* an enforcement commissioner of the National Enforcement Commission * * * should make findings and determinations that wages in the amount of $5,000,000 or more should be disallowed for income tax and or an alternatively contract reimbursement purposes for the year 1951" (R. 63), he "would recommend that the bank not extend the credit agreement" (R. 64). In answer to further questioning he stated that the same would be true "*if* the enforcement commissioner's findings and determinations was that the amount of such disallowance should be $3,000,000," $1,000,000 or ¾ of a million dollars,

[3] The entire payroll for the period under consideration amounted to $5,561,484.11, the alleged excessive payment to $959,857.50 (R. 77–78); appellee (Br., p. 8) states that correction of mathematical errors reduces the latter amount to $755,305.50. While General Order No. 15, Section 4 (b) (Main Brief, p. 92) provides that "the usual and general policy shall be to disallow an amount at least equal" to the excess payment, it plainly envisages the imposition of a sanction for a lesser amount, and, as we have shown in our main brief (p. 7, fn. 7), such disallowances have constituted a substantial portion of the cases handled by the National Enforcement Commission.

or if the findings were made by the National Enforcement Commission instead of by the enforcement commissioner (R. 64). Mr. Lawler did not make any statement that the holding of the hearing would impair appellee's credit standing, and there is no evidence in the record to that effect. This in itself disproves the finding that "continuance" of the proceeding "will cause plaintiff's bank credit to be shut off."

Of obvious significance in this connection is the disclosure on cross-examination that the banks' credit to appellee had been extended in December 1952, although the bank knew at that time of the pendency of the instant proceedings and of the resulting potential liability (R. 65–67).[4]

When questioned about the effect of the lifting of the injunction and the concomitant resumption of the proceedings upon appellee's credit standing, the witness did not state that this would result in an automatic or sure withdrawal of the bank credit. To the contrary, he testified that the bank's action would depend, in his opinion, on many contingencies, including the evaluation by counsel of appellee's chances to refute the charge, saying (R. 69):

> That would present, in my opinion, a contingency that would require very serious consideration and depending upon the

[4] The witness also did not deny that the loan had been continued despite a previous disallowance of $548,000 by the Air Force (R. 72, 58–59).

BLEED THROUGH

BLURRED COPY

amounts involved, depending upon the review of the matter by our legal counsel, I would be then in a position where I would have to appraise the degree of the contingency and the size and amount and that might give me cause and it certainly would change the position that the company is now in.

As I understand it, I am advised that the company is now protected by an injunction from further pursuit of this action which involves a sizeable sum of money which might very conceivably effect the financial condition of the company in a serious way. That is all a matter of opinion; I am expressing my opinion.

The contingent significance of Mr. Lawler's views is enhanced by his admission that the "decision is not entirely up to me," that the questions were only as to "what my recommendation would be to my bank" (R. 68). Not even a leading question on redirect examination could cause the witness to commit himself beyond this vague statement (R. 70).[5]

[5] "Mr. LUND. Mr. Lawler, speaking of contingency, I assume, looking at it from your view and the banker's view, with reference to possible recommendations to your Board of Directors, the seriousness of this contingency or potential liability is much greater, is it not, after an enforcement commissioner has heard the case and made recommendations for disallowance in the substantial amount than the seriousness of this contingency before such determination adverse to the company.

"Mr. LAWLER. In my opinion, that would be the case. I haven't made an analysis." (R. 70.)

Nor were his answers with respect to the effect of a recommendation made by the Enforcement Commissioner any more precise. When questioned by counsel for appellant as to what his credit recommendation would be if an adverse determination had been made by the Commissioner and the company had appealed from it with assurances, believed by the witness, that there was a good chance of success, he testified (R. 69):

> Mr. LAWLER. You haven't named an amount involved. I can't answer your question until I know what amounts are in your mind.
>
> Mr. GRONER. Why does the amount make a difference?
>
> Mr. LAWLER. Obviously, if it is 25 cents, it is going to make a difference to $250,000 or two and a half million. My recommendation, if the amount is 25 cents, is going to [be] entirely different than my recommendation if the amount is two and a half million.

When questioned from the bench about a hypothetical recommendation to disallow $500,000, Mr. Lawler disclosed that his testimony that he would recommend against the renewal of the loan had to be taken with more than a grain of salt; that it really meant that he "would recommend that our bank would not renew the agreement *on the present terms and conditions*" (italics supplied) (R. 71–72). This is far from a statement that there

BLEED THROUGH

BLURRED COPY

would be an unconditional cancellation of the loan. And then, in a continuation of his answer, the witness stated that the bank would not "take injurious action and deliberately endeavor to wipe a company out" (R. 71). This in itself refutes the court's finding that (R. 37):

> * * * the continuance of the threatened administrative proceeding will cause plaintiff's bank credit to be shut off and will disable plaintiff [appellee] from continuing its operations.

Mr. Lawler was the only witness who gave testimony with respect to when bank credit might be withdrawn. His testimony was not disputed and no one challenges his credibility. But this testimony must be read in the light of the facts that he was appellee's witness, and that the burden of proving irreparable injury was on appellee.

The finding of the court below must be appraised on the basis of the testimony on which it must have rested. Absolutely nothing in this testimony supports the broad findings which the court made on this issue.

Since the findings has no support at all in the evidence, it is clearly erroneous. At most, the evidence indicates that *if* the Enforcement Commissioner made a large enough award[6] against

[6] Such an unprecedently large disallowance would be unlikely unless the Enforcement Commissioner found that appellee had been guilty of substantially all the violations charged, and that these violations had been deliberate and

appellee, after the hearing the banks would consider changing the terms and conditions of the loans, but not in a manner which would wipe the company out. Such evidence of injury is, we submit, plainly insufficient to warrant a departure from the doctrine of the *Myers* and other cases.

II. NEITHER THE STATUTE NOR THE CONSTITUTION ARE VIOLATED BY CONSTRUING SECTION 405 (b) TO PERMIT MAXIMUM DISALLOWANCES AS GREAT AS THE ENTIRE UNAUTHORIZED PAYROLL

Appellee contends (Br. pp. 73, 83, 86) that Section 405 (b) does not authorize the disallowance of the entire illegal payroll but merely the disallowance of the unauthorized excess, and that, accordingly, regulations issued under Section 405 (b) are in conflict with the statute as to the amount of disallowance. Appellee also argues that, if either Section 405 (b) or the regulations issued thereunder do authorize disallowance of the entire illegal payroll, its constitutional rights have been infringed.

The issues thus raised are abstract. As we have shown, the certification by the National Enforcement Commission of a disallowance larger than the excess wages has been the rare exception (Appellants' Brief, p. 7, fn. 7). Hence, in the absence

intentional (cf. Main Brief, fn. 7, pp. 7–8). In such circumstances, where the irreparable injury asserted by appellee would be contingent upon a deliberate violation of the law, the clean hands doctrine should preclude any relief (cf. Main Brief, fn. 18, p. 29).

BLEED THROUGH

BLURRED COPY

of any indication to the contrary, it cannot be assumed that if in the instant case the administrative processes had been permitted to run their normal course the Commission would have certified a disallowance larger than the excess wages.[6a] That appellee must base its arguments on speculation as to the size of the disallowance emphasizes the prematurity of the points in the case. See the discussion of the legal principles in our main brief (pp. 26–32). Reference might also here be made to the separability clause of the Defense Production Act (Section 715, Appellants' Brief, p. 86), which evidences a clear Congressional desire to limit constitutional challenges to concrete cases. Putting these considerations aside, we will discuss the abstract questions presented.

A. SECTION 405 (b) AUTHORIZES THE DISALLOWANCE OF THE ENTIRE ILLEGAL PAYROLL, NOT MERELY OF THE UNAUTHORIZED PORTION OF THE WAGES

Section 405 (b) gives the President the authority to

> prescribe the extent to which any wage, salary, or compensation payment made in contravention of any such regulation or order shall be disregarded * * *.

Appellee's position is that the statutory language permits only the disallowance of the illegal portion of the wage payments. Since 1942 this language has been consistently construed as providing for the disallowance of the entire wage payment made in contravention of the regulation

[6a] We are advised that the largest disallowance by the National Enforcement Commission in a contested case has been $47,838 (*In re Beacon Marine Co. (Ocean Marine Repairs, Inc.)*, L. R. R. Binder 7, WHM 100: 1200, 1200e), and the largest pursuant to stipulation [illegible]

or order, and not merely of the unauthorized portion thereof. Any doubt as to the meaning of the statutory language is resolved by the legislative history, which fully supports this administrative construction.

1. Section 405 (b) is substantially identical with Section 5 of the Stabilization Act of 1942, which, as Congress knew, had been construed as authorizing the disallowance of the entire unauthorized payroll

As we have pointed out in our main brief (pp. 44–45), when Congress enacted Section 405 (b) it adopted "the language of [Section 5 of] the Stabilization Act of October 2, 1942, respecting the penalties to be applied for violations of the wage and salary stabilization program."[7] Section 5 had been interpreted and applied from the very beginning as authorizing the disallowance of the entire unauthorized payroll. The pertinent regulations repeatedly were brought to the attention of Congress at appropriation hearings and at hearings concerned with the extension of the stabilization legislation. The continued appropriation of funds for the National War Labor Board and the extension of the Act without amendment amount to the legislative ratification of this administrative practice.

a. *The administrative practice under Section 5 of the Stabilization Act of 1942.* Section 4001.10

[7] S. Rep. 2250, 81st Cong., 2d Sess., p. 39.

BLEED THROUGH

BLURRED COPY

of the Office of Economic Stabilization Regulations of October 27, 1942 (Main Brief, p. 88),[8] issued shortly after the enactment of the Stabilization Act, provided expressly that, where wages had been increased in contravention of the Act, the amount to be disallowed was

> the amount of the wage or salary paid or accrued and not merely an amount representing an increase in such wage or salary.

Experience in the actual enforcement of the statute indicated that the strict and unalterable application of this maximum disallowance to each violation was unduly harsh. On July 13, 1943, the National War Labor Board, charged with the enforcement of Section 5, obtained permission from the Economic Stabilization Director, the late Chief Justice Vinson, to take the circumstances surrounding the violation into consideration and to mitigate the amount of disallowance in appropriate cases.[9]

Office of Economic Stabilization Regulations of November 30, 1944, Section 4001.15 (9 F. R. 14547) accordingly provided that although the Act authorized the disallowance of the entire wage payments, extenuating circumstances could

---

[8] Section 4001.10 was superseded on October 1, 1943, by the substantially identical Section 4001.15. 8 F. R. 11960.

[9] *Termination Report of the National War Labor Board*, Vol. I, pp. 435–436; Vol. II, p. 749. See also *The National Wage Stabilization Board*, January 1, 1946–February 24, 1947, pp. 230–231.

justify the imposition of a lesser sanction.[10] The few decisions of the National War Labor Board cases in disallowance matters which have been reported indicate that the Board openly publicized and applied the rule that the entire illegal payroll could be disallowed in the absence of mitigating circumstances.[11]

Moreover, the National War Labor Board was not the sole agency charged with the enforcement of the Stabilization Act. The determination of violations of agricultural wages and salaries and the certification of the amounts to be disallowed were assigned to the Secretary of Agriculture,[12] later the War Food Administrator.[13] The Com-

[10] See also National War Labor Board Regulations, Section 802.73 (c), of September 15, 1944, 9 F. R. 11422, providing that where the Enforcement Division finds that the Act has been violated it shall make, in appropriate cases, findings as to the existence of extenuating circumstances, and a recommendation whether less than the full disallowance sanction should be imposed.

[11] For instances in which the entire illegal payroll was disallowed, see, *e. g.*, *Parkland Sportswear Co.*, 13 Labor Relations Reporter 503 (December 1, 1943); *Howard Menu Service*, 13 Labor Relations Reporter 687 (January 28, 1944); *Norfolk-Newport News Contractors*, 15 Labor Relations Reporter 237 (October 14, 1944). For mitigation cases, see, *e. g.*, *Parker Appliance Co.*, 13 Labor Relations Reporter 582 (Regional Board decision); *Oval & Koster*, 16 Labor Relations Reporter 741 (June 30, 1945); *Cosden Petroleum Corp.*, 16 Labor Relations Reporter 741 (June 30, 1945); *J. C. Zehrig*, 16 Labor Relations Reporter 742 (June 30, 1945).

[12] Office of Economic Stabilization Regulations of October 27, 1942, 7 F. R. 8748, as amended by the Regulations of November 30, 1942, Section 4001.5a, 7 F. R. 10024.

[13] Executive Orders No. 9322 of March 26, 1943 (8 F. R. 3807) and No. 9334 of April 19, 1943 (8 F. R. 5423).

BLEED THROUGH

BLURRED COPY

missioner of Internal Revenue was given the dual functions first of administering the Act with respect to salaries in excess of $5,000,[14] and, second, of actually giving effect to the certificate issued by the appropriate agency in the computation of taxes.[15] In all three instances the implementing regulations originally directed the disallowance of the entire illegal payroll;[16] later amendments, however, permitted the disallowance of a lesser amount in the presence of mitigating or extenuating circumstances.[17] One of these regulations, T. D. 5446 of March 17, 1945, governing the effect to be given to certificates of disallowance by the tax authorities, is still in effect, having been embodied in the permanent Income Tax Regulation. Cf. Treasury Regulations 111, Sec. 29.23a–16; 26 C. F. R. 29.23a–16.

---

[14] Office of Economic Stabilization Regulations of October 27, 1942, Section 4001.4, 7 F. R. 8749.

[15] Office of Economic Stabilization Regulations of October 27, 1942, Section 4001.10, Main Brief, pp. 87–89.

[16] Agricultural Labor: War Food Administration Regulations of January 17, 1944, Section 1100.15, 9 F. R. 659. Salaries in Excess of $5,000: Commissioner of Internal Revenue, T. D. 5186 of December 2, 1942, Section 1002.28, 7 F. R. 10056. Effect to Be Given Certificates of Disallowance: Commissioner of Internal Revenue, T. D. 5243 of March 12, 1943, 8 F. R. 3158.

[17] Agricultural Labor: War Food Administration Regulations of June 23, 1945, Section 1100.15, 10 F. R. 7615. Salaries in Excess of $5,000: Commissioner of Internal Revenue, T. D. 5435 of February 2, 1945, Section 1002.28, 10 F. R. 1475. Effect to Be Given to Certificates of Disallowance: Commissioner of Internal Revenue, T. D. 5446 of March 17, 1945, 10 F. R. 3008.

b. *Congressional acceptance of this administrative interpretation of Section 405 (b).* As we have shown in our main brief (pp. 46–48), the Stabilization Act was subject to searching Congressional scrutiny on the frequent occasions of its extension and also in connection with the appropriations for the National War Labor Board. Even in the absence of specific proof that Congress was actually advised of the interpretation of Section 405 (b) to the effect that the entire illegal payroll could be disallowed in the absence of mitigating circumstances, it would have to be assumed that Congress knew of this vast body of consistent regulations issued by different agencies and of the actual practice followed by them.

As a matter of fact, however, this interpretation of Section 405 (b) was brought to the attention of various Congressional Committees and explained to them to their satisfaction. Thus, at the hearings held in March 1944 in connection with the National War Agencies Appropriations Bill for 1945, referred to in our Main Brief at page 47, Mr. William H. Davis, Chairman of the National War Labor Board, pointed out to the House Subcommittee:

> So, in the Executive order and the regulations of the Economic Stabilization Director it was provided that the entire amount of wages paid in violation of law would be disallowed, not just the excessive part, but

BLEED THROUGH

BLURRED COPY

> the whole of it would be disallowed by these agencies of Government; provided, however, that the action of the War Labor Board, in cases which we cover, and the Treasury in case of salaries above $5,000, and so forth, gave us the power, if we found extenuating circumstances, to say to what extent those wages will be taken into account.[18]

Later on,[19] Mr. Davis pointed out that the question of disallowing the entire payroll came up only in 5% of the cases tried by the Board. The question whether the entire illegal payroll or only the illegal excess was to be disallowed came up again in June 1944 at the Senate hearings for the 1945 War Agencies Appropriations Bill.[20] After Mr. Freidin, General Counsel of the National War Labor Board, had explained to the Committee that, while the October 27, 1942 Regulations permitted the disallowance of the entire illegal payroll, authority had been obtained from the Director of Economic Stabilization to impose a lesser sanction in the presence of mitigating circumstances, Senator Hayden remarked

[18] Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 78th Cong., 2d Sess., on the National War Agencies Appropriations Bill for 1945, pp. 240–241.

[19] *Id.*, at p. 241.

[20] Hearings before a Subcommittee of the Committee on Appropriations, United States Senate, 78th Cong., 2d Sess., on H. R. 4879, pp. 132–133.

that it would be arbitrary if an overpayment of $88 in a $3,500 case necessarily led to a $3,500 tax disallowance. Mr. Freidin and Mr. Garrison, a public member of the Board, explained to the Senator that the mitigation practice was designed to prevent such arbitrary results. Senator Hayden summarized these assurances with apparent approval.

> It would be possible, under your procedure, if you say this was done innocently, to waive it entirely. But if you believe it is done deliberately, you want to make the penalty enough to discourage a repetition of the act.
>
> Mr. FREIDIN: Precisely so.

Similar advice as to the operation of the disallowance sanction of Section 405 (b) was given the 79th Congress in connection with the 1945 Extension of the Stabilization Act [21] and the National War Agencies Appropriations Bill for 1946.[22]

---

[21] Statement of Mr. William H. Davis, Chairman of the National War Labor Board of March 7, 1945, Hearings before the Committee on Banking and Currency, United States Senate, 79th Cong., 1st Sess., on S. J. Res. 30, p. 216:

> If the tripartite division finds that a violation exists, it considers all such extenuating circumstances in reaching its determination as to the amount of the unauthorized wages to be disallowed. It has been relatively rare in the experience of the Board that the violations by an employer have been deemed sufficiently willful or intentional to justify disallowance of the entire amount of wages paid in violation of the act.

[22] Statement of Dr. George W. Taylor, Chairman of the National War Labor Board, April 23, 1945, Hearings before the Subcommittee of the Committee on Appropriations,

BLEED THROUGH

BLURRED COPY

In these circumstances the repeated extensions of the Stabilization Act and the several appropriations of funds for the operation of the National War Labor Board and later for the National Wage Stabilization Board indicate that Congress, too, interpreted Section 5 of the Stabilization Act as authorizing the disallowance of the entire illegal payroll. And the reenactment of Section 5 as Section 405 (b) of the Defense Production Act carried with it the approval of their earlier interpretation of the statutory language. *Helvering* v. *Winmill*, 305 U. S. 79, 83; *Commissioner* v. *Flowers*, 326 U. S. 465, 469;[23] *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 308–315.

2. Events following the enactment of the Defense Production Act of 1950 indicate Congressional adherence to the interpretation permitting disallowance of the entire illegal payroll

On June 13, 1951, the Wage Stabilization Board issued its Enforcement Regulation No. 1, 16 F. R. 6028 (cf. Main Brief, p. 4). Section 1 of this

House of Representatives, 79th Cong., 1st Sess., pp. 12–13, pointing out that while the entire illegal payroll could be disallowed, the Board had authority to reduce or entirely eliminate these potentially severe penalties on the basis of the facts in each particular case.

[23] In connection with the above cited cases dealing with the weight to be given to Treasury Regulations of long standing, it should be remembered that the administrative interpretation of Section 405 (b) authorizing the disallowance of the entire illegal payroll has been embodied in its present form in Treasury Regulations 111, Section 29.23a–16 since 1945 and that it goes back to 1943.

Regulation—like General Order No. 15, Section 4 (b), involved in the instant case (Main Brief, pp. 91–92)—called for the disallowance of the entire wage payment, not merely of the illegal wage increase, in the absence of extenuating or mitigating circumstances.

That Congress was well aware of this Enforcement Resolution appears from the Congressional debates resulting in the Defense Production Act Amendments of 1951. Representative Davis of Georgia quoted the pertinent portion of Enforcement Regulation No. 1 and pointed out, on July 20, 1951 (97 Cong. Rec. 8555), that

> Under the provision as it now is, the entire wage or salary involved may be disallowed * * *.

He introduced an amendment [24] to make (*ibid.*)

> these heavy penalties possible to be invoked only if the violation was intentional, for the period prior to June 30, 1951, because of uncertainty in the administration of the Act prior to that time.

It is significant that Mr. Davis felt that total disallowance was authorized by the statute and that an amendment would be necessary to change it.

---

[24] The amendment would have provided in part "That as to any such payments made prior to June 30, 1951, this authority shall extend and be applied only to payments made in willful contravention of any such regulation or order" (97 Cong. Rec. 8555).

BLEED THROUGH

BLURRED COPY

Mr. Spence, the Chairman of the House Committee on Banking and Currency, which was in charge of the bill, objected on the ground that the amendment

> would prevent effective enforcement and destroy the effect we are trying to achieve by this act.

The House thereupon rejected the Amendment (*ibid.*[25]), thereby expressing its approval of the imposition of a disallowance sanction amounting to the entire payroll in appropriate cases.

Congress thereafter extended Section 405 (b) twice.[26] By the time of the last extension (June 30, 1952), the National Enforcement Commission had handed down its first decisions asserting its authority to disallow the entire payroll where warranted by the circumstances. *In re Hedin Construction Co.,* April 11, 1952, Bureau of National Affairs, Labor Relations Reporter Binder 7, WHM 100: 1153, 1163; cf. *In re Glascote Products,* June 3, 1952, *ibid.,* 1164, 1165–1166; *In re Boz Inc.,* June 24, 1952, *ibid.,* 1167, 1168.

The material referred to in the preceding pages shows that before the 1950 Act was passed Congress knew that its predecessor had been consistently construed as permitting disallowances as high as the entire payroll, that Congress

[25] The rejected amendment also would have provided for the judicial review of the determination of the disallowance (cf. Main Brief, pp. 49–50).

[26] Defense Production Act Amendments of 1951 and 1952.

deliberately used this identical language in 1950, and that it specifically refused to amend the Act in this respect when the interpretation was called to its attention, when the Act was extended and otherwise amended. It thus seems clear that this interpretation was both what Congress intended when the Act was passed and ratified thereafter.

B. THE STATUTORY DISALLOWANCE SCHEME IS NOT UNCONSTITUTIONAL

Since for the reasons stated the regulations permitting administrative disallowance up to and including the entire amount of the unauthorized payroll are authorized by the statute, we put to one side appellee's attempt to separate regulation from statute for purposes of constitutional attack.[27] The constitutional challenge must be considered as relating to the statute.

We submit that there can be no doubt that Congress can provide a varying or flexible system of disallowances or sanctions to be imposed in appropriate circumstances. Argument is unnecessary to prove that Congress may impose monetary penalties substantially greater than the amount involved in a particular violation; a fine may exceed the amount stolen. Here, neither statute nor regulation go that far—since the maximum disallowance is the amount of the unlawful wage payment.

[27] If the regulations were not authorized by the statute, the constitutional question would not be reached.

BLEED THROUGH

BLURRED COPY

As we have shown, the disallowance of an entire unauthorized payroll, the maximum permitted by the statute, occurred only in a single case in which there existed "* * * a deliberate and intentional violation after being expressly informed of * * * obligations under the law." Appellants' Main Brief, pp. 7–8, fn. 7. The sanctions applied in the bulk of the cases fell well short of the permitted maximum and were carefully designed to fit the circumstances of each case. *Ibid.* Standards with regard to mitigating or extenuating factors were set forth in wage enforcement regulations at all times and were known to, discussed with, and approved by Congress. *Supra,* pp. 16–22.

Appellee's attack on this system of disallowances, citing *Missouri Pacific Railway Co.* v. *Tucker,* 230 U. S. 340, is based on considerations precisely the opposite of those actually presented. The *Missouri Pacific* decision means no more than that a fixed and arbitrary penalty, to be applied without discretion and without relationship to the circumstances of the particular case, is bad. Here, of course, no such problem arises. On the contrary, Section 405 (b) provides flexibility, the opportunity for the exercise of discretion in particular cases, and the shaping of the sanction to carry out the public policy involved. Far less carefully designed systems have been sustained. Cf. *St. Louis, Iron Mountain & Southern Rail-*

way Company v. *Williams,* 251 U. S. 63, which differs from the *Missouri Pacific* case chiefly in that, just as here, the amount of the sanction lay within the discretion of the enforcing tribunal.

Appellee also cites (Br. p. 79) *Southwestern Tel. and Tel. Co.* v. *Danaher,* 238 U. S. 482, and *Wadley Southern R. Co.* v. *Georgia,* 235 U. S. 651, in support of an argument that the penalties here are unlawfully oppressive. But those cases and the principle for which they stand involve penalties definitely imposed and rapidly accumulating by the day or otherwise. If the carrier violated the law, it would subject itself to these heavily mounting penalties during the period in which the order was being tested in court; whereas if it complied, it would also suffer financial loss. Here there are no cumulative penalties and, indeed, only a possibility of a large tax disallowance, even assuming what has not yet been determined, that appellee has violated the law. The amount does not become greater during the period of litigation. In addition, it does not appear that compliance with the wage ceilings would have been costly; on the face of things, it should have been more economical. The National Labor Relations Board decision in the case cited at page 2, fn. 1, *supra,* implies that what appellee was seeking to avoid was the lawful unionization of its employees.

Such a system permitting the exercise of discretion in determining the amount to be disal-

BLEED THROUGH

BLURRED COPY

lowed, depending on the flagrance of the violation, with the total illegal payroll as a maximum, obviously violates neither the Eighth nor the Fifth Amendments.

III. NO IMPROPER DELEGATION OF LEGISLATIVE POWER IS CONTAINED IN THE STATUTORY SCHEME OF WAGE STABILIZATION ENFORCEMENT ESTABLISHED BY SECTION 405 (B)

Appellee has suggested (Br. p. 88) that Section 405 (b) is unconstitutional on the ground of unlawful delegation. This contention seems to fall into two parts. First, appellee contends that Congress lacked power to utilize administrative procedure for enforcement purposes. Second, appellee charges that Section 405 (b) contains no adequate standard with respect to the sanction to be imposed in the event a violation of wage stabilization regulations is found to have occurred.[28] These contentions have little merit.

A. CONGRESS MAY UTILIZE ADMINISTRATIVE PROCEDURE TO IMPOSE THE DISALLOWANCE SANCTION

As we have shown, Congress deliberately chose an administrative procedure culminating, in the event of violation, in a certification of appropri-

[28] Appellee also argues that the President lacked authority to delegate the enforcement function to the Office of Defense Mobilization after Title IV had expired (Br., pp. 56–58). In support of this contention appellee refers to the provision in Section 403 requiring the President, when he "determines that it is necessary to impose price and wage controls generally over a substantial portion of the national economy" to administer such controls "through a new independent agency created for such purpose." Section 403 itself expired

ate disallowance, as the only effective method of insuring adherence to wage stabilization regulations and orders, a crucial need in a war or emergency economy (Appellants' Main Brief, pp. 41–64). And there can be no doubt that the conscious selection of this enforcement technique, based upon the conclusive experience gained during World War II, was open to Congress.

It is well settled, as a matter of principle, that Congress may, where it deems the method appropriate, rest the enforcement of statutes, up to and including the imposition of sanctions, exclusively with an executive or administrative agency. "* * * Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of

---

on April 30, 1953. Moreover, Congress would not have intended to require that the carrying through to completion of enforcement proceedings *after* expiration of Title IV would have to be carried through by a "new" agency. The committee report shows that the reason for requiring the use of a "new" agency was to insure coordination in the administration and enforcement of price, wage and other controls involved in "the various aspects of this vast program." S. Rep. 2230, 81st Cong., 2d Sess., p. 38. Such coordination was obviously desirable during the period of active administration, while the programs were in effect, but it was unnecessary when all that was left to be done was the completion of specific enforcement proceedings against past violations. This does not mean that the expiration of Section 405 (b) precluded the President from authorizing the completion of enforcement by the Office of Defense Mobilization. His authority stems from the savings statutes discussed at pages 66–77 of our main brief, together with the authority conferred upon him by Title VII which does not expire.

BLEED THROUGH

BLURRED COPY

law. * * *." *Switchmen's Union* v. *Mediation Board*, 320 U. S. 297, 303; *Estep* v. *United States*, 327 U. S. 114, 120; *Lichter* v. *United States*, 334 U. S. 742.

The availability of this selection of remedy or sanction is not affected by the use, in the enforcement scheme, of a money penalty. "* * * [T]he legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power." *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 339; see, also, *Lichter* v. *United States, supra; United States* v. *Ju Toy*, 198 U. S. 253; *Passavant* v. *United States*, 148 U. S. 214.

Thus, the power of Congress to utilize administrative enforcement in the wage stabilization program is clear. Congress has certainly gone no further here, where enforcement culminates in the familiar tax collection processes.

B. SECTION 405 (b) PROVIDES SUFFICIENT GUIDANCE AS TO THE SANCTION TO BE IMPOSED

It is also well settled that constitutional prohibitions against unlawful delegation of legislative power are not infringed where Congress has

provided intelligible principles to guide the exercise of the delegated authority. *Lichter* v. *United States, supra; American Power Co.* v. *S. E. C.,* 329 U. S. 90, 104; *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381; *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126; *Hampton & Co.* v. *United States,* 276 U. S. 393. Flexibility of administration is not only permitted but desirable, particularly where, as here, Congress seeks to deal with a complex and difficult subject under an emergency program. *Lichter* v. *United States, supra; Yakus* v. *United States,* 321 U. S. 414, 423–424; *United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 574. Charges of unlawful delegation for want of precise standards, such as that leveled by appellee herein, must be approached in the light of these principles.

First, we turn to the language of Section 405 (b). We think that if the problem of construction had to be approached in a vacuum, sufficient guidance would be found to exist in the language of the section itself. By the first sentence of the section, as we have seen (pp. 10–22, *supra*), Congress made illegal the entire wage payment in contravention of a maximum wage regulation. "No employer shall pay, and no employee shall receive, any wage * * * in contravention of any regulation or order promulgated by the President under this title." The second sentence of the section not only provides the method of enforcement, namely, a Presidential directive as to ex-

BLEED THROUGH

BLURRED COPY

ecutive or administrative disallowances, but also creates in the President the power to remit some or all of the illegal payment thus prescribed. Specifically, Section 405 (b) directs the President to prescribe "* * * the extent to which any wage * * * payment made in contravention * * * shall be disregarded * * *."

This statutory enforcement scheme parallels the familiar method of enforcing the criminal law by allowing the court to prescribe a maximum sentence or a lesser sentence in its discretion. This statute is no more unconstitutional as a delegation of legislative power than is that familiar device.

But here the problem cannot be approached in a vacuum. As we have shown, Section 405 (b) was consciously and specifically copied by Congress in 1950 from the substantially identical text of Section 5 of the 1942 Stabilization Act; this 1950 utilization by Congress of the language of the 1942 section took place with actual knowledge of the interpretation and application of the earlier section, in thousands of cases, on every point here material; and Congress was specifically aware of, and approved, the interpretation and application of Section 405 (b) during the Korean emergency period. This close and continuous familiarity with the interpretation and application of Section 5 and Section 405 (b), specifically included knowledge that the statutory language had been construed as permitting the disallowance of the en-

tire illegal payroll of a violating employer as a maximum, with a power to remit or mitigate the amount of sanction to be imposed in appropriate circumstances.[29]

Given these circumstances, no genuine question of delegation arises. On the contrary, there is here presented the clearest possible case of ratification by Congress of the administrative interpretation and application of statutory language precisely reenacted with full knowledge of such prior interpretation and application. *Helvering* v. *Winmill,* 305 U. S. 79, 83; *Commissioner* v. *Flowers,* 326 U. S. 465, 469; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 308–315. The conscious recognition and approval by Congress, in enacting Section 405 (b), of the minutely detailed pattern worked out during World War II with regard to wage stabilization enforcement would, in and of itself, give more than sufficient content to the language of Section 405 (b) in so far as standards are concerned. This means that the words of the statute are to be read as if they expressly authorized the method of determining the amount to be disallowed—described in the antecedent regulation—and copied into the present one.

In far more stringent circumstances than are here present, general congressional approval by statute of prior detailed executive orders and

[29] See Appellants' Main Brief, pp. 6, 92, for a detailing of the factors in mitigation.

BLEED THROUGH

BLURRED COPY

proclamations has been upheld against a charge of unlawful delegation for want of standards. *Hirabayashi* v. *United States,* 320 U. S. 81, 102–104. And this Court has recently held that the adequacy of a statutory standard can be measured by reference to an administrative practice known to the enacting Congress and projected into the statute under enactment. *Lichter* v. *United States,* 334 U. S. 742, 777, 783. The renegotiation field furnishes a strikingly similar sequence of statute, administrative interpretation and reenactment. The *Lichter* decision (pp. 777, 783) followed the reasoning of *Spaulding* v. *Douglas Aircraft Co.,* 154 F. 2d 419, 425 (C. A. 9) that "* * * [w]hatever difficulties may be found in the original act, the amendments of October 21, 1942, merged the detailed administrative practice with the statute in a manner to foreclose all possibility of further doubt." Here both the 1950 Act in relation to the administrative regulation and practice under the 1942 Act and the later amendments and reenactments in relation to the regulation and practice after 1950 merged the detailed administrative practice into the law.

IV. THE DISALLOWANCE SANCTION IS NOT IN CONFLICT WITH THE REQUIREMENT OF ART. I, SECTION 9, OF THE CONSTITUTION THAT ALL DIRECT TAXES NOT COVERED BY THE SIXTEENTH AMENDMENT BE APPORTIONED

On p. 87 of its brief appellee makes an involved argument to the effect that by disallowing deduc-

tions for wages in the computation of its income, its income tax ceases to be levied upon "income" and is outside the scope of the income tax authorized by the Sixteenth Amendment. Accordingly, appellee concludes that the tax is unconstitutional because Art. I, Section 9, of the Constitution requires that all direct taxes be apportioned. There are two short answers to this argument, (1) the taxes levied upon business income, in particular that of corporations, never has been considered a direct tax, and, (2) the "income" specified in the Sixteenth Amendment is gross income; hence, the allowances of income tax deductions for business expenses are a matter of legislative grace.

1. *An income tax is not a direct tax to the extent that it is based upon business income*

The basic premise of appellee's argument is that the income tax levied upon it is a direct tax which requires apportionment unless it comes within the terms of the Sixteenth Amendment. This analysis fails at the very threshold since this Court has held consistently that a tax imposed upon business income is not a direct tax.

Thus, in *Pollack* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, in which the Income Tax of 1894 was held unconstitutional, this Court was careful to point out (at pp. 635, 637) that an income tax is a direct tax only to the extent that it is levied

BLEED THROUGH

BLURRED COPY

upon income derived from real estate and personal property, and refused to comment

> on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

Accordingly, the Corporation Tax Act of 1909, which preceded the Sixteenth Amendment, was held constitutional as "an excise tax upon the conduct of business in a corporate capacity, measuring, however, the amount of tax by the income of the corporation." *Stratton's Independence* v. *Howbert,* 231 U. S. 399, 414; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 151–152.

Similarly, the decisions interpreting the Income Tax Acts enacted subsequent to the Sixteenth Amendment are careful to point out that except for their incidence upon income derived from real or personal property, income taxes are in the nature of indirect excise taxes. *Brushaber* v. *Union Pacific R. R.,* 240 U. S. 1, 16–17; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103, 114. The latter case is of particular import, since it rejected the argument similar to the one advanced here, that an income tax statute which does not allow for an adequate depletion allowance is not authorized by the Sixteenth Amendment.

Since the appellee's income sought to be taxed here is derived from business and not from real

or personal property, the application of the income tax to it would be in the nature of an indirect excise tax, and appellee's reliance on the Sixteenth Amendment is utterly misplaced.

2. *The granting of deductions for business expenses is completely within legislative control*

The second branch of appellee's argument is that the income tax authorized by the Sixteenth Amendment is a tax upon net income and does not permit Congress to disregard any costs of doing business.

Pursuant to Section 23 (a) (1) (A) of the Internal Revenue Code, "a reasonable allowance for salaries or other compensation for personal services actually rendered * * * shall be allowed as deductions." Appellee appears to argue that it has some vested, constitutional right to this deduction and that it is beyond the power of Congress to disallow it. This Court, however, has held consistently that "every deduction from gross income is allowed as a matter of legislative grace" (*White* v. *United States,* 305 U. S. 281, 292; *New Colonial Tea Co.* v. *Helvering,* 292 U. S. 435, 440; *Helvering* v. *Bankline Oil Co.,* 303 U. S. 362, 366; *Interstate Transit Lines* v. *Commissioner,* 319 U. S. 590, 593; *McDonald* v. *Commissioner,* 323 U. S. 57, 60), and "does not turn on general equitable considerations" (*Deputy* v. *du Pont,* 308 U. S. 488, 493).

BLEED THROUGH

BLURRED COPY

Moreover, even in the absence of a direct statutory command, deductions for expenses tainted with illegality may be disregarded. *Textile Mills* v. *Commissioner,* 314 U. S. 326, 335–339, and see *Lilly* v. *Commissioner,* 343 U. S. 90, 97, stressing the difference between an unethical and an illegal business expenditure.

Hence, since Congress has the power completely to disallow deductions for wage payments, and since even without a statute wage payments made in violation of anti-inflationary legislation could be disallowed as deductions, Congress without doubt had the power to provide for the disallowance sanction of Section 405 (b). The courts accordingly have upheld tax disallowances which came up under Section 5 of the Stabilization Act of 1942. *Weather-Seal Manufacturing Co.* v. *Commissioner,* 16 T. C. 1312, affirmed without opinion, 199 F. 2d 376 (C. A. 6); *N. A. Woodworth* v. *Kavanagh,* 102 F. Supp. 9 (E. D. Mich.), affirmed on the opinion of the District Court, 202 F. 2d 154 (C. A. 6).

The cases cited by appellee do not hold to the contrary. *Doyle* v. *Mitchell Bros. Inc.,* 247 U. S. 179, involved the extent to which the proceeds of a sale of a capital asset constitute income. This Court held as a matter of statutory interpretation, using the term "income" in its "natural and obvious sense," that the determination of income derived from the sale of property required the deduction from the proceeds of the

sale of an amount equal to the costs of the asset. (247 U. S. at 184, 185.) No constitutional question was involved. There was no occasion to pass on the proposition asserted here by appellee that a statutory computation of income which did not leave the capital investment intact would be unconstitutional. To the contrary, as we have pointed out above [30] this Court has held repeatedly in the related field of wasting assets such as mines or gas that Congress is under no constitutional obligation to provide for a depletion allowance, large enough to restore the capital investment. *Stratton's Independence* v. *Howbert,* 231 U. S. 399; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103; *Von Baumbach* v. *Sargent Land Co.,* 242 U. S. 503, 521–526; *United States* v. *Biwabik Mining Co.,* 247 U. S. 116; *Helvering* v. *Bankline Oil Co.,* 303 U. S. 362, 366–367.

Nor is appellee aided by decisions such as *Lela Sullenger,* 11 TC 1076; *Commissioner* v. *Weisman,* 197 F. 2d 221 (C. A. 1); *Hofferbert* v. *Anderson Oldsmobile, Inc.,* 197 F. 2d 504 (C. A. 4). In these instances the tax authorities unsuccessfully sought to disallow as costs of goods sold those portions of the purchase prices paid by the taxpayer which exceeded the OPA ceiling. In all three instances the decisions were largely influenced by the consideration that, in contrast to wage and salary stabilization, prior to the Defense

[30] *Supra,* pp. 33–34.

BLEED THROUGH

BLURRED COPY

Production Act Amendment of 1951 Congress had not expressly provided for tax disallowance in the case of price control violations (main brief p. 50, 61–64). The courts were reluctant, in the absence of an express statutory direction, to sanction a computation of income which did not provide for the reimbursement for capital expenditures.[31]

V. THE ABSENCE OF RECITALS AS TO INDUSTRY CONSULTATION DOES NOT AFFECT THE VALIDITY OF THE INSTANT PROCEDURAL REGULATIONS

Section 709 of the Defense Production Act provides in pertinent part (Appellants' Main Brief, pp. 85–86):

> * * * Any rule, regulation, or order, or amendment thereto, issued under authority of this Act shall be accompanied by a statement that in the formulation thereof there has been consultation with industry representatives, including trade association representatives, and that consideration has been given to their recommendations, or that special circumstances have rendered such consultation impracticable or contrary to the interest of the national defense, but no such rule, regulation, or order shall be invalid by reason of any subsequent finding by judicial or other authority that such a statement is inaccurate.

[31] Cf. the comment on the *Sullenger* case in *Weather-Seal Mfg. Co.* v. *Commissioner*, 16 TC 1312, 1320, affirmed, 199 F. 2d 376 (C. A. 6).

Appellee contends (Br. p. 67) that the procedural regulations, under which the administrative proceedings here involved were to have taken place, violate Section 709 in that they fail to recite that industry consultation took p'ace in connection with their formulation or that such consultation was impracticable. Specifically, the regulations thus attacked are General Orders 15 and 18 and Revised General Procedural Regulation No. 1, described in detail in our main brief at pp. 5–10.[32]

In the first place, Section 709 is not applicable to general procedural regulations such as we have here. The reference to "industry" and "trade association" representatives indicates that Congress was thinking of regulations of particular industries with respect to business practices. See 96 Cong. Rec. 12176–7, 14064–5. Such a reference would not be appropriate for general rules of procedure, as to which business men are not experts and which do not pertain to particular industries. Which trade association representatives and which industries, for example, would

[32] These procedural regulations, covering procedure before the National Enforcement Commission, all stem from Enforcement Regulation No. 1, 16 F. R. 6028 (Appellants' Main Brief, p. 4) which was issued by the tripartite Wage Stabilization Board on June 13, 1951, at which time enforcement was a function of the Board. As we have shown, on July 28, 1952, enforcement was transferred to the National Enforcement Commission, a separate entity created by the Economic Stabilization Administrator. Appellants' Main Brief, p. 5.

BLEED THROUGH

BLURRED COPY

be consulted in framing such procedural regulations?

The establishment of enforcement machinery and procedure is purely governmental business, to be worked out with due regard for controlling rules of law. No one would have expected that business or industrial representatives should be consulted as to the method of proceeding against violators of administrative regulations. The regulations here involved, in summary, provide that the National Enforcement Commission shall determine, on complaint by other governmental agencies, whether the wage stabilization requirements have been violated, describe the procedure to be followed by that Commission (in conformance with customary procedural standards for administrative agencies), and define the policies to be followed by the Commission in determining the amounts to be disallowed in particular cases. Obviously the requirement in Section 709 for consultation with industry and trade association representatives cannot have been meant to cover regulations such as these.

Secondly, the consultation requirement of Section 709 is properly limited to those regulations which pertain to the control of industry and trade, such as the regulation of prices, credit, and the allocation of materials. Wage stabilization, however, imposes ceilings on the wages paid to labor, and thus impinges primarily upon the rights of employees. If Section 709 had been meant to reach the subject of wage stabilization, it presumably

would have required consultation with representatives of labor and not merely with industry and trade association representatives.

A reason why this was not required is disclosed in the framework of the statute. The regulation with respect to prices, priorities and the like was to be by Government officials representing only the public. There was good reason to require such persons to seek the views of the groups to be regulated.

Where wage stabilization was concerned, Title IV established a different and far more direct procedure. Section 403 (b) (1) created the Wage Stabilization Board to be composed "* * * in equal numbers, of members representative of the general public, members representative of labor, and members representative of business and industry. * * *" This provision for direct participation by industry and labor in the promulgation of regulation in the field of wage stabilization would have made further consultation with representatives of industry and labor both unnecessary and repetitious.

A word should be said as to the history of the predecessor of Section 709, Section 2 (a) of the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. App. 902 (a), which also required consultation with industry.[33] This provision was inapplic-

[33] The pertinent sentence in Section 2 (a) provides that: Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be af-

BLEED THROUGH

BLURRED COPY

able to the wage stabilization program which was created by the subsequently enacted Stabilization Act of 1942, 56 Stat. 765, 50 U. S. C. App. 961, *et seq.* But even with respect to price control, the Emergency Court of Appeals has stated that "we never found occasion to set aside a regulation on this ground [failure to consult with industry], even assuming the provision in question could have been deemed mandatory, and not directory merely." *Norman-Frank, Inc.* v. *Arnall,* 196 F. 2d 502, 504 (E. C. A. 1952), a case under the 1950 Act which cites the cases under the earlier act. The court went on:

> At any rate, the point has been rendered academic by a provision in the Defense Production Act of 1950 which had no counterpart in the Price Control Act of 1942.

The court then quoted Section 709, italicizing the last clause which provides that:

> but no such rule, regulation, or order shall be invalid by reason of any subsequent finding by judicial or other authority that such a statement is inaccurate.[34]

---

fected by such regulation or order, and shall give consideration to their recommendations.

[34] Section 404 of the 1950 Act also provides:

> In carrying out the provisions of this title, the President shall, so far as practicable, advise and consult with, and establish and utilize committees of, representatives of persons substantially affected by regulations or orders issued hereunder.

This section does not contain the provision, such as that in Section 709, for "a statement" that there has been

VI. THE RESIGNATION IN DECEMBER, 1952, OF THE INDUSTRY MEMBERS OF THE WAGE STABILIZATION BOARD HAS NO RELATIONSHIP TO THIS PROCEEDING

It is argued by appellee that "the collapse of the tripartite Wage Stabilization Board destroyed the statutory scheme for administration of wage controls." (Br. p. 70).

On December 6, 1952, the Chairman of the Wage Stabilization Board in Washington resigned and, on the same day, the industry members of the Board also resigned. On December 15, 1952, the Economic Stabilization Administrator designated the remaining public members of the Board as the Wage Stabilization Committee. General Order 19, 17 F. R. 11368. The stated purpose of this order was to provide an interim administration of the wage stabilization program while the Board was rendered inoperative by the resignation of the industry members. The interim administration was to terminate as soon as the Board was again rendered operative by the appointment of industry members.

The change in the organization of the wage stabilization agency is irrelevant here. The only functions which the statute required to be per-

---

consultation with industry representatives, and, we submit, was purely precatory or directory, not mandatory. In any event, for the reasons set forth above, Section 404, like Section 709, could not appropriately be applied to general procedural or wage regulations.

BLEED THROUGH

BLURRED COPY

formed by a tripartite board are defined in Section 403 (b) (5) of the Act as follows:

> (5) The Board shall, under the supervision and direction of the Economic Stabilization Administrator—
>
> (A) formulate, and recommend to such Administrator for promulgation, general policies and general regulations relating to the stabilization of wages, salaries, and other compensation; and
>
> (B) upon the request of (i) any person substantially affected thereby, or (ii) any Federal department or agency whose functions, as provided by law, may be affected thereby or may have an effect thereon, advise as to the interpretation, or the application to particular circumstances, of policies and regulations promulgated by such Administrator which relate to the stabilization of wages, salaries, and other compensation.
>
> For the purposes of this Act, stabilization of wages, salaries, and other compensation means prescribing maximum limits thereon. Except as provided in clause (B) of this paragraph, the Board shall have no jurisdiction with respect to any labor dispute or with respect to any issue involved therein. * * *

Although this subsection vests the authority to issue general wage stabilization regulations in the tripartite board, nothing in the law requires the use of such a board as a part of the enforcement

machinery in wage stabilization cases. Section 405 (b) grants to the President the authority to enforce wage stabilization by disallowances, and Section 703 authorizes him to delegate such authority, without in any way limiting him to the Wage Stabilization Board.

Furthermore, this proceeding was instituted on November 4, 1952, on behalf of the tripartite board prior to the Board's reorganization in December, 1952 (R. 3, 10). The case was to be heard by the National Enforcement Commission, a separate component of the Economic Stabilization Agency from the Wage Stabilization Board. The case was to have been prosecuted, if it had been allowed to go on, by a regional attorney for the Wage Stabilization Board or its successor. But no further action by the Board itself was necessary.

Appellee does not appear to claim that a tripartite board must necessarily participate in the enforcement process. Its argument seems to be that only such a board could rule on contentions that appellee's wage increases were authorized under the applicable regulations or could have given an interpretation as to the application of the regulations in the particular circumstances. And it is said that such advice from the Board might have precluded the commencement of the enforcement proceeding.

But the fact that an agency was not available to "*advise* as to the interpretation, or the applica-

BLEED THROUGH

BLURRED COPY

tion to particular circumstances" of the regulations plainly does not mean that they cannot be enforced by other agencies having enforcement authority. If this were not the case no statute subject to administrative interpretation could be enforced after it had expired, despite the general saving statute and other saving provisions, which prove the contrary.[35]

Even if appellee's contention were not defective for all of the reasons stated above, it would lack substance. It amounts to a suggestion that an industry or labor boycott of a tripartite Board automatically cuts off the agency's power to function without regard to the importance of the continuance of that function in the public interest. Where such a boycott or withdrawal occurs, an interim administration must be provided, as it was here, to protect the public. Even if such an interim administration be considered as not free to engage in new matters, it clearly would have the power to continue proceedings authorized by the tripartite Board.

VII. THE REGULATIONS ARE NOT INVALID AS RETROACTIVE

Appellee argues (Br. pp. 74–76) that the regulations would be invalid as applied to wage increases occurring before June, 1951, when the Wage Stabilization Board's resolution prescrib-

[35] Here the executive order terminating substantive controls specifically saved the procedure for administrative enforcement. Executive Order No. 10434, 18 F. R. 809.

ing enforcement procedure was issued. But the substantive wage stabilization regulation which fixed the maximum wage level was issued on January 26, 1951 (16 F. R. 816), prior to any of the alleged violations. See p. 4, main brief. The fact that it took some time to set up the agency necessary to administer the controls, including the enforcement machinery, did not mean that the appellee was suffering penalties for conduct which it did not know was illegal. Moreover, the regulation merely implemented the statute, which itself authorizes the imposition of an appropriate disallowance in the event of violation of the substantive regulation. The fact that the amount to be disallowed would not be determined until after the circumstances of the case had been developed in the administrative proceeding did not constitute the imposition of a penalty improperly retroactive, any more than does the defendant's uncertainty in an ordinary case as to the amount of the fine or damages which may ultimately be imposed by a tribunal having discretionary authority.

BLEED THROUGH

BLURRED COPY

CONCLUSION

For the reasons set forth herein as well as for the reasons set forth in our main brief, we respectfully submit that the judgment below should be reversed.

SIMON E. SOBELOFF,
Solicitor General.

WARREN E. BURGER,
Assistant Attorney General.

ROBERT L. STERN,
Special Assistant to the Attorney General.

SAMUEL D. SLADE,
HERMAN MARCUSE,
Attorneys.

CHARLES H. KENDALL,
General Counsel,
Office of Defense Mobilization.

MARCH 1954.

U. S. GOVERNMENT PRINTING OFFICE 51-74

E COPY

FILED
NOV 2 19
HAROLD B. WILLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 450

ARTHUR P. ALLEN, CHAIRMAN, TWELFTH REGION WAGE STABILIZATION BOARD; ET AL.,

Appellants,

vs.

GRAND CENTRAL AIRCRAFT CO., A CALIFORNIA CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM

PAUL R. WATKINS,
DANA LATHAM,
R. W. LUND,
Counsel for Appellee.

BLEED THROUGH

BLURRED COPY

INDEX

Subject Index

	Page
Statement opposing jurisdiction and motion to affirm	1
Statement	1
Statutes involved	5
The judgment of the District Court should be affirmed	5
The Defense Production Act of 1950 authorizes the courts, not the executive, to determine whether the Act has been violated, and to impose penalties prescribed by the executive	6
Appellee would be irreparably injured by a National Enforcement Commission hearing, regardless of the outcome	10
The National Enforcement Commission's threatened action was in violation of statute upon grounds additional to those relied upon by the District Court	12
The Commission had no authority to make determinations after April 30th, 1953	12
The collapse of the tripartite wage stabilization board destroyed the statutory scheme for administration of wage controls	15
The governing regulations were invalid because of the absence of adequate statements of considerations	16
The regulation which prescribes the extent to which wage payments may be disallowed is void	17
General Order 15, in denying any judicial review of disallowance proceedings, was unauthorized by the Act and deprived appellee of due process of law	18
The threatened application of Title IV and Section 405(b) of the Act against appellee was unconstitutional	19

Page

Title IV of the Defense Production Act denied appellee of due process of law 20
Lack of judicial review 20
Excessive penalty without relation to damages suffered 20
Section 405(b) as interpreted by appellants denied appellee its right to a jury trial under the Sixth Amendment 21
Disallowance of wage payments for tax purposes resulted in the imposition of a tax on gross receipts and was unconstitutional 22
Other constitutional objections 23
Conclusion and motion to affirm 23

Appendix "A"—Pertinent Sections of the Defense Production Act of 1950 (50 U.S.C. App. Sections 2061, et seq.) 25

TABLE OF CASES CITED

Belcher Oil Company v. *Griffin*, 23 CCH Lab. Cas., Par. 67,723 9
Brooks v. *Dewar*, 313 U.S. 354, 61 S. Ct. 979 9
Commissioner v. *Weisman*, 197 F. 2d 221 23
De La Rama Steamship Company v. *Pierson*, 174 F. 2d 84 10
Doyle v. *Mitchell Brothers*, 247 U.S. 179, 38 S. Ct. 467 22
Estep v. *United States*, 327 U.S. 114, 66 S. Ct. 423 20
Ex Parte Endo, 323 U.S. 283, 65 S. Ct. 208 9
Fleming v. *Mohawk Wrecking and Lumber Company*, 331 U.S. 111, 67 S. Ct. 1129 9
Grand Central Aircraft Company v. *Jones*, No. 15,603, United States District Court for the Southern District of California 11
Helvering v. *Mitchell*, 303 U.S. 391, 58 S. Ct. 630 22
Hertz v. *Woodman*, 218 U.S. 205, 30 S. Ct. 621 14
Leimer v. *Woods*, 196 F. 2d 828 22
Missouri Pacific Railway Company v. *Tucker*, 230 U.S. 340, 33 S. Ct. 961 21

BLEED THROUGH

BLURRED COPY

Page

National Labor Relations Board v. *Jones Laughlin Steel Corporation*, 301 U.S. 1, 57 S. Ct. 615 22
Ng Fung Ho v. *White*, 259 U.S. 276, 42 S. Ct. 492 20
People ex rel. Lemon v. *Elmore*, 256 N. Y. 489, 177 N.E. 4, 75 A.L.R. 1292 ..... 21, 22
Pollack v. *Farmers Loan and Trust Company*, 157 U.S. 429, 15 S. Ct. 673 22
Southwestern Telephone and Telegraph Company v. *Danaher*, 238 U.S. 482, 35 S. Ct. 886 20
Sullenger, Lela, 11 Tax Court 1076 22
Troy Laundry Company v. *Wirtz*, 329 U.S. 723, 155 F. 2d 53 10
United States v. *Jepson*, 90 F. Supp. 983 22
United States v. *Ship Helen*, 6 Cranch 203 12
Wadley Southern Railroad Company v. *Georgia*, 235 U.S. 651, 35 S. Ct. 214 20
Weather-Seal Manufacturing Company v. *Commissioner*, 199 F. 2d 376, 16 T.C. 1312 ..... 10, 22
Woodworth Company v. *Kavanagh*, 202 F. 2d 154, 102 F. Supp. 9 ..... 10, 18

STATUTES AND OTHER AUTHORITIES CITED

Congressional Record:

Volume 96:

Page 12,133 20
Page 12,480 20
Page 14,072 20
Page 14,073 20

Volume 99:

Number 144, Page 10,712 14

Constitution of the United States:

Article 1, Section 9 22
Fifth Amendment 20
Sixth Amendment 22
Eighth Amendment 23
Sixteenth Amendment 22

Page

Defense Production Act of 1950 (50 U.S.C. App. 2061, et seq.; 64 Stat. 798), Section 403(b), as amended in 1952, 50 U.S.C. App. 2103(b); 66 Stat. 300 15

Defense Production Act of 1950 (50 U.S.C. App. 2061, et seq.; 64 Stat. 798):

- Section 403(b)(1), 50 U.S.C. App. 2103(b)(1), 66 Stat. 300 15
- Section 403(b)(5), 50 U.S.C. App. 2103(b)(5) 2, 15
- Section 405(a), 50 U.S.C. App. 2105(a) 23
- Section 405(b), 50 U.S.C. App. 2105(b) 2, 23
- Section 407 20
- Section 408, 50 U.S.C. App. 2107 20
- Section 409(b), 50 U.S.C. App. 2109(b) 18
- Section 705(b), 50 U.S.C. App. 2155(b) 13, 28
- Section 706(b), 50 U.S.C. App. 2156(b) 7, 13, 23, 24
- Section 709, 50 U.S.C. App. 2159 ..... 16, 19, 28
- Section 717, 50 U.S.C. App. 2166 12
- Section 717(a), as amended, 50 U.S.C. App. 2166(a) 12
- Section 717(b)(3), 50 U.S.C. App. 2166(b)(3) 12

Executive Order 10,161, 15 F.R. 6105 2
Executive Order 10,434, 18 F.R. 809 14
Federal Register, Volume 17, Page 11,368 4

General Order of the Administrator to the Wage Stabilization Board:

- Number 15, Section 4, (17 F.R. 2994, 9977) 2, 7, 17, 21
- Number 15, Section 6 18
- Number 18, (17 F.R. 6225, 9977) 3, 17
- Number 19, (17 F.R. 11,368) 15

General Procedural Regulation of the National Enforcement Commission Number 1, Revised:

- Section 4.1(b) .....
- Section 4.1(f) 11
- Section 8.1(b), (17 F.R. 7737, 18 F.R. 1663) 3, 6, 17
- Section 10.1, (17 F.R. 7737) 20

General Wage Stabilization Regulation Number 1 3

BLEED THROUGH

BLURRED COPY

Page

Hearings Before the Senate Committee on Appropriations on the Supplemental Appropriation Bill, House Report 6200, 83rd Congress, First Session:

Pages 424 through 434 9
Page 457 14
Pages 464 through 466 14

House of Representatives Report Number 1090, 83rd Congress, First Session, Pages 5 and 13, Amendments 76 and 77 15

House of Representatives Report Number 2759 8

House of Representatives Report Number 3042 (on House of Representatives Report Number 9176), 81st Congress, Second Session, 1950 8

Senate Report Number 677, 83rd Congress, First Session, Page 17 14

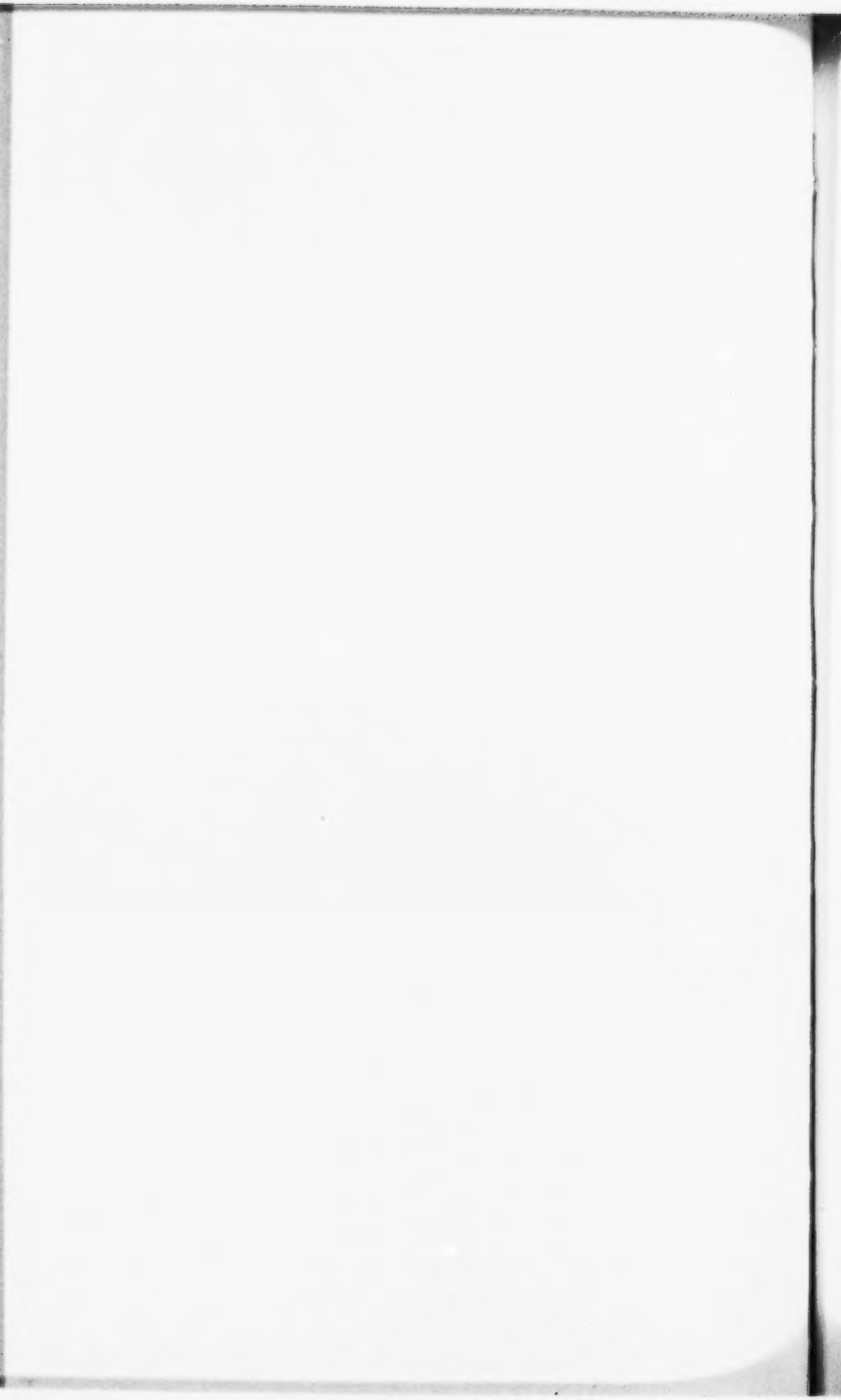
Senate Report Number 1599, 82nd Congress, Second Session 15

Senate Report Number 2250, 81st Congress, Second Session, 1950, Page 39 8

Stabilization Act of 1942, Section 5(a), 50 U.S.C. App. 965(a), 56 Stat. 767 8

Supplemental Appropriation Bill of 1954, (Public Law Number 207, 83rd Congress, First Session) 9, 14

United States, Title I, Section 109, 61 Stat. 633 14



BLEED THROUGH

BLURRED COPY

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 32541

GRAND CENTRAL AIRCRAFT CO., A CALIFORNIA CORPORATION,

Plaintiff-Appellee,

vs.

ARTHUR P. ALLEN, CHAIRMAN, TWELFTH REGION WAGE STABILIZATION BOARD; ET AL.,

Defendants-Appellants

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM

The appellee in the above-entitled cause for its statement in opposition to appellants' statement as to jurisdiction herein, respectfully shows the following:

Statement

Appellee corporation has been engaged since before 1950 in the production, modification and overhaul of military aircraft and equipment under contracts with the United States Air Force. Its plants are located at Tucson, Arizona,

and Glendale, California. This suit was brought to restrain an administrative proceeding instituted to impose penalties on appellee for alleged violations of wage stabilization regulations.

Wage stabilization was inaugurated under authority of the Defense Production Act of 1950 (50 U. S. C. App. 2061, et seq., 64 Stat. 798). On September 9, 1950, an Economic Stabilization Agency, headed by an Economic Stabilization Administrator, was created by Executive Order 10161, 15 F. R. 6105. On July 30, 1952, administration of wage controls was delegated by the Administrator to the Wage Stabilization Board established by Section 403(b) of the Defense Production Act, as amended in 1952, 50 U. S. C. App. 2103(b), 66 Stat. 300.

The Administrator established sanctions for violations of wage regulations in his General Order 15 (17 F. R. 2994, 9977). This regulation provided for disallowance by governmental agencies of the cost of wages paid in violation of regulation. It specified that the amount to be disallowed was the entire amount of the wage paid in violation, not merely the excess over the legal payment, unless particular extenuating circumstances were found to exist. The statutory authority apparently relied upon was Section 405(b) of the Act, 50 U. S. C. App. 2105(b) which provides as follows:

> "No employer shall pay, and no employee shall receive, any wage, salary or other compensation in contravention of any regulation or order promulgated by the President under this title. The President shall also prescribe the extent to which any wage, salary, or compensation payment made in contravention of any such regulation or order shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation."

BLEED THROUGH

BLURRED COPY

In addition to establishing sanctions, the Administrator also provided for administrative adjudication of alleged violations, creating a National Enforcement Commission for this purpose. (General Order 18, 17 F. R. 6925, 9977, issued July 30, 1952). If it found there had been a violation, the Commission was directed to certify to other government agencies, and to direct such agencies to disregard for purposes of determining costs, the amount of wages paid in violation.

Disallowance of wages for income tax purposes has been the principal result of a determination of violation.

Conduct of proceedings before the National Enforcement Commission was governed by General Procedural Regulation 1, Revised (17 F. R. 7737, 18 F. R. 1663). Initial decisions were made by Enforcement Commissioners, appointed by the Commission to conduct the hearings, to make findings, and to recommend the amounts to be disallowed. If no appeal to the Commission was taken from such findings, they became final in the absence of clear error and the recommended amount of disallowance was adopted.

On November 4, 1952, the Wage Stabilization Board filed a complaint with the National Enforcement Commission against appellee, alleging, without greater particularity, that appellee had, during the period from January 26, 1951, to January 1, 1952, granted to its employees wage increases in violation of General Wage Stabilization Regulation 1 (the wage-freeze regulation). On November 21, 1952, appellee moved the National Enforcement Commission for a more definite statement of the allegations contained in the complaint.

On December 6, 1952, industry members of the Wage Stabilization Board resigned and were never replaced. A Wage Stabilization Committee, composed of the public

members of the Board, was appointed by the Administrator. (General Order 19, 17 F. R. 11368.)

On December 15, 1952, the wage complaint was ordered amended by the National Enforcement Commission by a statement that the wage increases complained of were those shown as "merit" increases on appellee's records, that such increases required prior approval of The Wage Stabilization Board, and that such approval had not been obtained. Subsequently, appellee was advised by the Regional Council of the Twelfth Regional Wage Stabilization Board that the total payroll allegedly in violation was over five and one-half million dollars. Disallowance of this payroll for income tax purposes would result in the assessment of two to three million dollars additional income tax for the year 1951.

A hearing before an Enforcement Commissioner was set for February 24, 1953. The present suit was instituted February 13, 1953 against the officials and agents of the Wage Stabilization Committee and the National Enforcement Commission threatening to conduct said hearing. Service was obtained upon regional wage officials and the Enforcement Commissioner designated to conduct the administrative hearing. National committee and commission officials were not served and, with the exception of defendant Groner, who argued the case for defendants, did not appear in the action.

Appellee's complaint alleged that the threatened application of Section 405(b) against appellee was repugnant to the United States Constitution. Alternatively, it was alleged that the regulations and orders establishing the National Enforcement Commission and providing for certifications of disallowance were unauthorized by the Act. Appellee alleged that it would be irreparably injured by appellants' threatened action in holding a hearing prin-

BLEED THROUGH

BLURRED COPY

cipally because of the disastrous effect such a hearing would have on appellee's ability to obtain indispensable weekly loans under an existing credit agreement with certain banks.

Lengthy oral argument on appellee's application for a preliminary injunction was held before a three-judge court and on March 11, 1953, a temporary restraining order was issued against appellants. An interlocutory injunction was issued by said court on May 28. Appellants' application for stay of the interlocutory injunction pending appeal was denied by this court June 15, 1953 (345 U. S. 988). Trial was held July 24 and further oral argument was heard at that time. A decree permanently restraining appellants from prosecuting or hearing the charges brought against appellee was granted by the three-judge court on July 31.

The district court found that there was no statutory authority for the imposition of penalties by the National Enforcement Commission but that jurisdiction was in the district courts. It further found that the very continuance of the threatened administrative hearing would cause appellee's bank credit to be cut off, which would disable appellee from continuing in operation and would thereby cause irreparable injury. The grounds for these conclusions were amplified in a written opinion.

Statutes Involved

In addition to the statutes set forth in Appendix B of Appellants' Statement as to Jurisdiction, other provisions of the Act pertinent to the issues discussed herein are set forth in Appendix A attached hereto.

The Judgment of the District Court Should Be Affirmed

Appellant invites review of the district court's judgment on the ground that the decision jeopardizes about 2,500 proceedings in which disallowances have already been

determined or stipulated. It is intimated that all violators of wage regulations will, as the result of such judgment, be enabled to avoid the consequences of their conduct. Why appellee's rights should depend upon the fact that appellants have for several years been conducting hearings and certifying disallowances without statutory authority is not made clear.

Furthermore, the intimation that punishment will be circumvented is without foundation. First, it is doubtful that stipulated settlements could be reopened in any event. Stipulations are required to set forth facts establishing the violation of a wage order and the existence of extenuating or mitigating circumstances justifying disallowance of less than the full amount of the illegal payment (General Procedural Regulation 1, Revised, Sec. 8.1(b), 17 F. R. 7737). The district court merely held that violations were to be determined and penalties imposed by the district courts. Settlements of liability are not prohibited and these stipulations constitute admissions which undoubtedly would prevent recovery in any refund suit. Second, even in the case of disallowances resulting from contested proceedings, appellants do not suggest that a federal court in a refund suit (in which the plaintiff must show he is justly entitled to refund) could not itself determine whether a violation had occurred and uphold any tax disallowance. As a matter of fact, the district court here concluded that there was such jurisdiction.

I

The Defense Production Act of 1950 Authorizes the Courts, Not the Executive, to Determine Whether the Act Has Been Violated, and to Impose Penalties Prescribed by the Executive.

Appellants assert that the President had power under Section 405(b) to direct the executive departments to dis-

BLEED THROUGH

BLURRED COPY

regard for tax computation and other purposes, wages paid in violation of wage ceilings. This view is not at variance with that of the district court, which recognized in its opinion that ". . . the Act authorizes the President to prescribe the *extent* to which any unauthorized payment . . . may be disregarded. . . ." Section 405(b), by its very terms, went this far but no further. In order to sustain the claimed authority of the National Enforcement Commission, there must be read into the section further executive authority to *adjudge* that a violation has occurred and to decree imposition of the penalties prescribed. It is respectfully submitted that no such authority existed and that the executive authority given by Section 405(b) was exhausted after the establishment in Section 4 of General Order 15, (17 F. R. 2994, 9977), of the standards for the disallowance of payments in violation of the statute.

The plain words of Section 405(b) authorized the executive to promulgate rules establishing penalties. The plain words of Section 706(b), 50 U. S. C. App. 2156(b), granted to the district courts the authority to adjudge whether violations occurred and to impose the prescribed penalty:

> "The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this Act or any rule, regulation, order, or subpena thereunder, and of all civil actions under this Act to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, order, or subpena thereunder . . ."

Appellants attempt to dispose of this section by arguing it was limited in application to injunction suits and criminal prosecutions (Appts'. Statement, pp. 7-8), but this construction simply ignores the breadth and inclusiveness of the language used.

It is said that the Act exhibited Congressional intention to vest the President with authority to combat inflation, and appellants cite numerous sections from Title IV to show that the President had broad powers. But the sections cited uniformly conferred rule-making, as opposed to *adjudicatory*, power. The argument really proves that Section 405(b) was also intended to relate only to rule-making. This crucial distinction between the two kinds of power was observed by the district court.

Legislative history does not furnish support for the construction proffered by appellants. Admittedly, Section 405(b) follows the language of Section 5(a) of the Stabilization Act of 1942, 50 U. S. C. App. 965(a), 56 Stat. 767. However, even assuming the validity of administrative determinations of violation under that act—and, as we point out below, no court has passed upon the point—the legislative history of the 1950 Act does not indicate any Congressional awareness, much less approval, of such administrative procedure. On the contrary, the Senate Committee Report merely noted the similarity in *language* and stated that disallowance was an effective deterrent (S. Rep. No. 2250, 81st Cong., 2d Sess. p. 39, 1950), while the House and Conference reports did not even mention the provision (H. R. Rep. No. 2759, H. R. Rep. No. 3042 (on H. R. 9176), 81st Cong., 2d Sess., 1950). Even if it were shown that the Congress which passed the Defense Production Act was aware of the World War II administrative practice we submit that Congress' intent to repudiate and prevent such practice was manifested by the enactment of a specific provision giving the district courts jurisdiction of ". . . violations of this Act or any rule, regulation, order, or subpena thereunder. . . ." (Sec. 706(b)). This provision, *enacted for the first time in 1950*, marked a complete departure from the 1942 Act and rendered irrelevant any argument based on construction of the earlier act. See the decision directly in

BLEED THROUGH

BLURRED COPY

point in *Belcher Oil Co.* v. *Griffin*, 23 CCH Lab. Cas., Par. 67,723 (D. C. N. D. Ga. 1953).

Appellants urge legislative "ratification" of their action by the Supplemental Appropriation Bill of 1954 (Pub. L. No. 207, 83d Cong., 1st Sess.) passed months after both the suspension of wage controls and the expiration, on April 30, 1953, of authority conferred under Section 405(b) (*cf.* Section 717). But the appropriation in Public Law 207 for the "Economic Stabilization Agency" cannot be said to indicate the specific approval of the action of the National Enforcement Commission which is required by the doctrines of *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 118 (N. 10), 67 S. Ct. 1129 (1947), and *Brooks* v. *Dewar*, 313 U. S. 354, 61 S. Ct. 979 (1941), compare *Ex Parte Endo*, 323 U. S. 283, 303 (N. 24), 65 S. Ct. 208 (1944), particularly in view of the fact that the Economic Stabilization Agency's principal activity at the time was in connection with rent control. In fact, members of the Senate Committee on Appropriations, upon being apprised of the pendency of the present case, clearly recognized that the issues presented were for the courts to decide (Hearings Before the Senate Committee on Appropriations on the Supplemental Appropriation Bill, H. R. 6200, 83rd Cong., 1st Sess., pp. 424-434). And, in the full context cited, it can be seen that the statement of appellee's representative Holland, relied on so heavily by appellants, could not be understood even as dealing with, much less as "conceding", the validity of the National Enforcement Commission's establishment.

Several cases are cited by appellants as upholding, under the 1942 Act, the administrative imposition of disallowances. Of them two things may be said. First, they involved a different statute, which made no provision for adjudication in the district courts. Second, in none of them was the issue raised of the agency's power to make deter-

minations of violations for disallowance purposes. In *Troy Laundry Co.* v. *Wirtz*, 155 F. 2d 53, 55 (9th Cir. 1946), *cert. denied*, 329 U. S. 723 (1946), the issue was the subpena power of the War Labor Board. The court treated the administrative hearing involved as one intended to "enable the President to perform his administrative function with reference to the fixing of prices for commodities or services in which the wage is a factor", and again, as one intended "to enable him to perform his function of fixing the price of the service or goods referred to above." In *De La Rama S. S. Co.* v. *Pierson*, 174 F. 2d 84 (9th Cir. 1949), a contract action involving the defense of illegality, there is neither a holding nor language remotely in point. In *Woodworth Co.* v. *Kavanagh*, 102 F. Supp. 9 (D. C. E. D. Mich. 1952), *aff'd per curiam*, 202 F. 2d 154 (6th Cir. 1953), the distinction between prescription and imposition of penalties was not discussed by the court and was not raised by counsel (Brief of Appellants, pp. 12-13, Transcript of Record, p. 6). In *Weather-Seal Mfg. Co.* v. *Commissioner*, 16 T. C. 1312 (1951), *aff'd mem.*, 199 F. 2d 376 (6th Cir. 1952), only the constitutionality of disallowing wages as tax deductions was in issue. Our disagreement with the *Woodworth* and *Weather-Seal* cases—both of which received memorandum affirmance from the Sixth Circuit—is noted below, but it is not upon the ground that those cases are opposed to the reasoning of the district court here.

II

Appellee Would Be Irreparably Injured by a National Enforcement Commission Hearing, Regardless of the Outcome.

The district court found, as stated in its Findings of Fact, "that the continuance of the threatened administrative proceeding will cause plaintiff's bank credit to be shut off and

BLEED THROUGH

BLURRED COPY

will disable plaintiff from continuing its operations." This finding was based upon uncontradicted evidence, including the testimony of an official of one of the banks extending credit to appellee, and upon examination of the existing credit agreement. Appellants do not, nor could they reasonably, assert that the finding was unsupported by evidence.

Appellants argue that the district court is in error because no tax disallowance sanction could have been assessed by the Enforcement Commissioner, that he could do no more than issue an advisory opinion to the Commission. This argument completely ignores the specific finding quoted above, for the district court was not concerned with the stage of the proceedings at which finality would attach but rather with what would in fact happen to appellee's extension of credit if the hearing were held at all. In any event, the premise is false. The Enforcement Commissioner's determination has many aspects of finality. He is directed to issue his "Findings and Determination" and if no appeal is taken therefrom these "shall, in the absence of clear and prejudicial error, be adopted by the National Enforcement Commission and a certificate of disallowance based thereon issue . . ." (General Procedural Regulation 1, Revised, Sec. 4.1(f), 17 F. R. 7737).

The decision in the case of *Grand Central Aircraft Co.* v. *Jones*, No. 15603, D. C. S. D. Cal., which was adverse to appellee on the issue of equitable jurisdiction, was not only handed down before trial, while full trial was held by the district court here, but was issued without the benefit of any oral argument. The cases cited therein rest on the doctrine of exhaustion of administrative "remedies". None of them holds that such exhaustion is required where, as found by the district court herein, a plaintiff would thereby be forced out of business and hence would be deprived of all recourse to the courts.

III

The National Enforcement Commission's Threatened Action Was in Violation of Statute upon Grounds Additional to Those Relied upon by the District Court.

The district court's judgment may be supported upon other statutory grounds in addition to those relied upon by that court.

A. The Commission Had No Authority to Make Determinations After April 30, 1953

Although it did not reach the point, the district court noted, in its opinion, that there was substantial merit in appellee's argument that any authority of the National Enforcement Commission ceased in any event on April 30, 1953, under Section 717 (50 U. S. C. App. 2166). This ground is respectfully urged in support of the district court's judgment.

Section 717(a), as amended (50 U. S. C. App. 2166(a)), provides:

> ". . . titles IV and V of this Act and all authority conferred thereunder shall terminate at the close of April 30, 1953."

Hence, Section 405(b), part of Title IV, expired on April 30. When a statute is repealed, or, as in the case of Title IV, expires under its own terms, any liability created ceases, in the absence of a "savings" clause. *United States* v. *Ship Helen*, 6 Cranch 203 (1810).

Section 717(b)(3), 50 U. S. C. App. 2166(b)(3), provides:

> "Any agency created under this Act may be continued in existence for purposes of liquidation for not to exceed six months after the termination of the provision authorizing the creation of such agency."

BLEED THROUGH

BLURRED COPY

This section did not permit continuance of the Commission for two reasons. First, it was not invoked. The language "may be continued" is permissive only. It obviously did not permit the agency to continue itself, and no higher authority issued any order continuing the agency prior to the expiration of its powers. Second, an agency could be continued only "for purposes of liquidation." It is submitted that this did not mean doing business as usual. Even if the agency were properly continued in existence, it could not hold hearings, for conducting such hearings would be merely a continuation of its pre-April 30 activities and would render meaningless the clause "for purposes of liquidation."

Nor was the threatened proceeding saved by the specific "savings" clause in Section 706(b), 50 U. S. C. App. 2156(b):

> ". . . The termination of the authority granted in any title or section of this Act, or of any rule, regulation, or order issued, thereunder, shall not operate to defeat any suit, action, or prosecution, whether heretofore or thereafter commenced, with respect to any right, liability, or offense incurred or committed prior to the termination date of such title or of such rule, regulation, or order. . . ."

This provision was not intended to apply to administrative proceedings. First, it appeared in a section dealing exclusively with court litigation. Second, the language was not applicable to administrative proceedings. A "suit" is an equity case, an "action" is a law case, and a "prosecution" is a criminal case. And when Congress intended to include an "administrative proceeding" within the scope of any provision of the Act, it specifically used the term, as in the case of the "immunity bath" provision, Section 705(b), 50 U. S. C. App. 2155(b), which refers to the "grand jury

or in any court or administrative proceeding." Compare, in this connection, Executive Order 10434, 18 F. R. 809, suspending controls, which contained a savings clause covering "any suit, action, prosecution, or administrative enforcement proceeding."

Nor was the general "savings" clause, 1 U. S. C. Sec. 109, 61 Stat. 633, applicable. It was clearly superseded by the specific savings clause in the Defense Production Act. *Hertz v. Woodman*, 218 U. S. 205, 30 S. Ct. 621, 625 (1910).

The legislative history of the Supplemental Appropriations Bill of 1954, Public Law 207, 83d Cong. 1st Sess., gives strong support to the contention that any adjudicatory authority possessed by the National Enforcement Commission expired on April 30, 1953. The Economic Stabilization Agency had requested $290,000 for liquidation. This amount included expenses of "Wage & Salary Enforcement," "Supervision," "Legal Protests to Price Regulations," "Price Enforcement" and "Fiscal Operations." (Hearings Before the Senate Committee on Appropriations on the Supplemental Appropriation Bill, H. R. 6200, 83d Cong., 1st Sess., pp. 457, 464-466.) The Senate committee reduced the House appropriation by $290,000, struck the reference to the Economic Stabilization Agency, leaving funds available only for the Office of Rent Stabilization, and reported as follows to the Senate:

> "It is the sense of the committee that pending cases should be turned over to the Department of Justice for review, so that the agency will not be continued by a continuation of these suits." (S. Rep. No. 677, 83d Cong., 1st Sess., p. 17).

On the Senate floor, the $900,000 recommended by the Committee was raised to $1,500,000, solely in order to make provision for terminal leave payments (99 Cong. Rec. No. 144, p. 10712). The committee's directive was in no way

BLEED THROUGH

BLURRED COPY

modified by such action. And even the increased appropriation for terminal leave purposes was reduced by the Conference committee to $1,200,000. While it was necessary to make the appropriation available to the Economic Stabilization Agency so that terminal leave could be paid to employees besides those in the Office of Rent Control, it is clear that there was no intention to restore amounts for continuation of administrative disallowance proceedings, which the Senate committee had recognized were outside the liquidation function. (H. R. Rep. 1090, 83d Cong., 1st Sess., pp. 5, 13, Amdts. 76, 77.)

B. The Collapse of the Tripartite Wage Stabilization Board Destroyed the Statutory Scheme for Administration of Wage Controls

Under Section 403(b)(1) of the Act, added in 1952, (50 U. S. C. App. Section 2103(b)(1), 66 Stat. 300), Congress created a Wage Stabilization Board composed of public, industry, and labor members, apparently believing that the interests of labor and industry could only be protected with such a Board as a watchdog, even though the ultimate power be in the Economic Stabilization Administrator. Yet there has been no statutory Wage Stabilization Board since the resignation of industry members on December 6, 1952. The Administrator sought to fill this gap by creating an all-public-member Wage Stabilization Committee on December 15, 1952 (17 F. R. 11368). He, of course, had no authority to take action clearly conflicting with the express will of Congress, and Congress had expressly disapproved establishment of a wage board composed solely of public members, (S. Rep. 1599, 82d Cong. 2d Sess.).

The significance of this development in the present case is that the Board was vested with the function, under Section 403(b)(5), (50 U. S. C. App. Sec. 2103(b)(5)), of ad-

vising as to "the application to particular circumstances of policies and regulations promulgated by the Administrator" and relating to wages. Under this provision appellee would have been entitled, as a matter of right, had the Board not been defunct, to have sought a ruling by the Board that appellee's wage increases were authorized under the applicable regulations, or, at least, to have obtained an interpretation as to the application of the regulations in the particular circumstances. Such advice from the Board would have gone far to preclude agents of the Administrator from seeking the commencement of court action, or, if the administrative enforcement procedure were valid, would have been binding upon the National Enforcement Commission. However, from December 6, 1952—before appellee was apprised of the particular grounds upon which it was alleged to have violated the applicable regulations—this route through which appellee could have obtained relief was closed.

C. The Governing Regulations Were Invalid Because of the Absence of Adequate Statements of Considerations

The administrative disallowance procedure was invalid not only because unauthorized by statute, but also because the regulations purporting to establish it were void for lack of an adequate statement of considerations. Section 709 (50 U. S. C. App. 2159) required that any rule or regulation issued under authority of the Act be accompanied by a statement that in its formulation there was consultation with industry representatives and that consideration was given to their recommendations, or that special circumstances rendered such consultation impractical or contrary to the interest of national defense. It further provided that no rule should be held invalid by reason of a finding that such statement was *inaccurate*.

BLEED THROUGH

BLURRED COPY

Neither General Order 15 (17 F. R. 2994, 9977), General Order 18 (17 F. R. 6925, 9977), nor General Procedural Regulation 1, Revised (17 F. R. 7737, 18 F. R. 1663), contained a statement of considerations adequate under this section. Yet the requirement of a statement applied to "all" regulations; this was recognized by the agencies themselves, as was demonstrated by the half-hearted attempt at compliance in General Procedural Regulation 1, Revised, *supra*.

The section declared that a regulation should not be held invalid for non-compliance with the section's requirements only in one instance—where the statement was inaccurate. The clear implication was that in all other instances of non-compliance with the section's requirements, such as complete omission of the statement or the statement's failure to set forth the fact of consultation or non-consultation with industry representatives, the regulation *was* invalid. The result was to require a statement of considerations but to prevent collateral inquiries. Such inquiries would be unnecessary; Congress could assume the truth of the statement because the possibly burdensome requirement of consultation could be avoided by the agency's written statement that consultation was impracticable. But Congress did put agencies under a duty to consult when practicable and concluded that the best way of insuring compliance, without injecting extraneous issues into every suit for violation, was to require that a statement of considerations be made. Because of the complete absence of such a statement the cited regulations are, we submit, invalid.

D. The Regulation Which Prescribes the Extent to Which Wage Payments May Be Disallowed Is Void

While Section 4 of General Order 15 (17 F. R. 2994, 9977) provided that the entire amount of any wage paid

in violation of regulation could be disallowed, we submit that such an interpretation was in conflict with the authority granted by Section 405(b) of the Act and that only the excess illegally paid was subject to disallowance. Only that part of the wage payment in excess of the allowable was "in contravention" of any regulation. Suppose, for example, that instead of an illegal salary increase, an illegal bonus had been given to an employee. Obviously, only the bonus payment was illegal and the regular paycheck was not an illegal payment. The same should have been true where an employer improperly granted an illegal raise. We are aware that under the 1942 Act a contrary point of view was expressed in *Woodworth* v. *Kavanaugh*, 102 F. Supp. 9, D. C. Ed. Mich., 1952; *aff'd. per curiam*, 202 F. 2d 154 (6th Cir., 1953), but the court's discussion of the subject is not convincing and the only question properly before the court was the Government's motion to dismiss on other grounds.

E. General Order 15, in Denying Any Judicial Review of Disallowance Proceedings, Was Unauthorized by the Act and Deprived Appellee of Due Process of Law

The difficulty with appellants' theory that the Act authorized administrative disallowance proceedings is emphasized by the provision in Section 6 of General Order 15 (17 F. R. 2994, 9977), that determinations of violations and disallowances "shall be final and not subject to review by the Tax Court of the United States or by any court in any civil proceeding".

As we discuss below, Congress concededly intended to make wage regulations non-reviewable. But there is no indication that *disallowances* were not to be subject to review. The penalty provided by Congress for a wilful violation is $10,000 (Sec. 409(b), 50 U. S. C. App. 2109(b));

BLEED THROUGH

BLURRED COPY

the penalty authorized by General Order 15, if the order was legal, amounted to several millions of dollars in the instant case if there had been a violation. This is shockingly severe. Certainly, if Congress had intended to permit findings of violation, resulting in the imposition of such a penalty, by the extraordinary procedure of a non-reviewable administrative determination without the safeguards of a jury trial or the rules of evidence, it clearly would have said so in no uncertain terms. Yet there is not one single provision in the Act providing for notice, hearing and other procedures which would insure fairness in administrative disallowance determinations. Even the protection provided in the Administrative Procedure Act is not applicable to any administrative hearings necessary under the Defense Production Act (Sec. 709, 50 U. S. C. App. 2159). Surely if Congress had intended a determination of disallowance by administrative action it would have made some provision granting, defining, and limiting such administrative authority.

It is therefore clear that the provision for complete administrative finality not only rendered illegal the entire administrative proceeding, because it denied due process of law for the reasons discussed in point IV(A)(1) below, but was also unauthorized under the Act.

Of course, no problem could have existed in this connection had disallowances been sought in the district courts, as the statute directed.

IV

The Threatened Application of Title IV and Section 405(b) of the Act Against Appellee Was Unconstitutional

While the District Court properly avoided the constitutional issues raised by the Complaint, we respectfully urge these issues before this Court as constituting additional support for the judgment below.

A. Title IV of the Defense Production Act Denied Appellee Due Process of Law

1. *Lack of Judicial Review.* No provision was made in the Defense Production Act for judicial determination of the validity of wage and salary regulations, although there was detailed provision (Secs. 407, 408, 50 U. S. C. App. 2107, 2108) for such review of price regulations. This lack of provision for review in the statute itself, taken in conjunction with the Congressional history explaining the reason for such absence (96 Cong. Rec. 12133, 12480, 14072-14073), showed persuasively that Congress intended that such regulations be non-reviewable. However practical the reason for this withdrawal of review, it clearly contravened the due process clause of the Fifth Amendment. *Ng Fung Ho* v. *White*, 259 U. S. 276, 42 S. Ct. 492 (1922); *see Estep* v. *United States*, 327 U. S. 114, 120, 66 S. Ct. 423 (1945). Thus, the effect of the statute was not only to require submission to a challenged regulation, in the face of the risk of heavy penalty—a procedure held unconstitutional in prior Supreme Court cases of unimpaired authority, *Southwestern Telephone & Telegraph Co.* v. *Danaher*, 238 U. S. 482, 490, 35 S. Ct. 886 (1914); *Wadley Southern R. Co.* v. *Georgia*, 235 U. S. 651, 662, 35 S. Ct. 214 (1918)—but, as extended by the Administrator (General Procedural Regulation 1, Revised, sec. 10.1, 17 F. R. 7737), to prevent any challenge of the regulations even in a proceeding brought to determine violation. The unconstitutionality of such a procedure is highlighted when the heavy penalties which Section 405(b) of the Act purportedly authorized are considered.

2. *Excessive Penalty Without Relation to Damages Suffered.* The regulations of the Economic Stabilization Administrator interpreted the statute as authorizing dis-

BLEED THROUGH

BLURRED COPY

allowance of the entire amount of wage paid in violation of regulation, not only of the illegal excess (General Order 15, 17 F. R. 2994, 9977). While we submit that this construction was untenable, if the statute did authorize disallowance of the entire amount then it is clear that the penalty bore no relation either to the damage to the public interest or to the extent of the violation or to any other standard. In some cases, the amount of excess might have been very small and the remaining wage very large, while in others the amount of excess itself might have been very large—yet there was no statutory differentiation between the minor violation and the major violation and the lack thereof rendered the statute invalid, *Missouri Pacific Railway Co.* v. *Tucker*, 230 U. S. 340, 351, 33 S. Ct. 961 (1912). Furthermore, application of the penalty of tax disallowance denied due process to the extent that different monetary penalties resulted solely because of the tax bracket of the particular employer-taxpayer and without relation to the degree of the violation. Nor, it is interesting to note, did the regulations governing the disallowance standards to be followed make any express provision for mitigating the effect of these inequalities, although providing for other mitigating circumstances (General Order 15, Section 4, 17 F. R. 2994, 9977).

B. Section 405(b) as Interpreted by Appellants Denied Appellee Its Right to a Jury Trial Under the 6th Amendment

The disallowance provision of the statute, at least to the extent that the entire amount of a wage could be disallowed, clearly imposed a penalty and in an action on a statutory penalty, analogous to the common law action of debt, the constitutional right to a jury trial must be recognized. *People ex rel Lemon* v. *Elmore*, 256 N. Y. 489, 177 N. E. 14,

75 A. L. R. 1292 (1931); *Leimer* v. *Woods*, 196 F. 2d 828, 834 (8th Cir. 1952). Yet no jury trial was available in administrative disallowance proceedings which appellants claim were authorized by the statute. While it can be said that the imposition of penalties for wage violations was not a proceeding known to the common law, this fact does not furnish the premise for an argument that the right to a jury trial need not have been afforded, for it proves too much. If it were a complete answer to say that any administrative proceeding is an action unknown to the common law, then Congress could, by statutory enactment, destroy the right of trial by jury. By such specious reasoning the effectiveness of the 6th Amendment would be completely nullified. *See United States* v. *Jepson*, 90 F. Supp. 983, 986 (D. C. N. J. 1950). Cases such as *National Labor Relations Board* v. *Jones Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615 (1937), and *Helvering* v. *Mitchell*, 303 U. S. 391, 58 St. Ct. 630 (1938), involved merely remedial sanctions and hence are distinguishable.

C. Disallowance of Wage Payments for Tax Purposes Resulted in the Imposition of a Tax on Gross Receipts and Was Unconstitutional

Under Article 1, Section 9, of the Constitution, a tax on gross receipts is unconstitutional unless apportioned. *Pollack* v. *Farmers Loan and Trust Co.*, 157 U. S. 429, 15 S. Ct. 673 (1895). By the statutory device of disallowance, the right to include wages as part of the cost of goods or services sold for income tax purposes was impaired. The result was imposition of a gross receipts tax, not permitted by the Sixteenth Amendment. *Cf. Doyle* v. *Mitchell Bros.*, 247 U. S. 179, 38 S. Ct. 467 (1918); *Lela Sullenger*, 11 Tax Court 1076 (1948); *but cf. Weather-Seal Mfg. Co.* v. *Commissioner*, 16 T. C. 1312, *aff'd mem.*, 199 F. 2d 376 (6th Cir.

BLEED THROUGH

BLURRED COPY

1952). See also *Commissioner* v. *Weisman*, 197 F. 2d 221 (1st Cir. 1952), a case involving price disallowance, where the court carefully avoided the constitutional issue but nevertheless noted (at note 1, p. 224) that under Section 405(a), 50 U. S. C. App. 2105(a), which is identical in effect with Section 405(b):

> "It is possible . . . that in effect the tax levied would amount to a gross receipts tax."

D. Other Constitutional Objections

Other doubts concerning the constitutionality of Section 405(b), as urged in appellee's complaint, are that the section involved an unconstitutional delegation of legislative power; that its application resulted in the imposition of an excessive fine, prohibited by the Eighth Amendment; and that its application impaired the obligation of contracts and thereby denied due process of law.

Conclusion and Motion to Affirm

Under the district court's construction of the statute many of the difficulties raised by an administrative proceeding are obviated. Thus, construing the grant of jurisdiction over violations to the federal courts to be unlimited and therefore to include authority to impose disallowance penalties is not only in accordance with the express terms of Section 706(b) (50 U. S. C. App. 2156(b)), but such construction avoids constitutional issues of denial of judicial review and right to jury trial. The construction of Section 405(b) (50 U. S. C. App. 2105(a)) need not be strained to derive administrative authority to determine violations when such authority is not granted expressly. The absence of specification of notice and hearing procedures which are ordinarily part of a grant of administrative adjudication authority—indeed, the expressed inapplicability of the Administrative Procedure Act—requires no dubious impli-

cation that such procedures were intended when it is recognized that administrative adjudication was not intended. The "savings" clause in Section 706(b) (50 U. S. C. App. 2156(b)) can be applied to save all liabilities, as would not be the case if some were enforceable only by agency action, authority for which has already expired. The term "liquidation" need not be construed to authorize doing business as usual.

In view of the above, the entire proposed administrative enforcement proceeding against appellee, through a commissioner of the National Enforcement Commission, was illegal under the statute. Consequently, it should not be necessary for the court to even consider the constitutional issues. However, if it should be determined that the proceedings were valid under the Act, then, we submit, the statute is unconstitutional in the various respects discussed.

For the reasons hereinabove set forth, it is submitted that the appellants present no substantial question for the decision of this court and appellee respectfully moves that the final judgment and decree of the district court be affirmed.

Respectfully submitted,

PAUL R. WATKINS,
DANA LATHAM,
R. W. LUND,
Counsel for Appellee.

BLEED THROUGH

BLURRED COPY

APPENDIX A

PERTINENT SECTIONS OF THE
DEFENSE PRODUCTION ACT OF 1950
(50 U. S. C. App. Sec. 2061 et seq.)

Section 403(a) and (b), as added 66 Stat. 300:

(U. S. C. Sec. 2103(a) and (b))

"(a) At such time as the President determines that it is necessary to impose price and wage controls generally over a substantial portion of the national economy, he shall administer such controls, and rationing at the retail level of consumer goods for household and personal use under authority of Title I of this Act (when and to the extent that he exercises such authority), through a new independent agency created for such purpose; *Provided, however,* That the President shall administer any controls over the wages or salaries of employees subject to the provisions of the Railway Labor Act, as amended, through a separate board or panel having jurisdiction only over such employees. Such agency may utilize the services, information and facilities of other agencies and departments of the Government, but such agency shall not delegate enforcement of any of the controls to be administered by it under this section to any other agency or department.

"(b) (1) There is created, in the present Economic Stabilization Agency, or any successor agency, a Wage Stabilization Board (hereinafter in this subsection referred to as the "Board"), which shall be composed, in equal numbers, of members representative of the general public, members representative of labor, and members representative of business and industry. The number of offices on the Board shall be established by Executive order.

"(2) The members of the Board shall be appointed by the President, by and with the advice and consent of the Senate. The President shall designate a Chairman and Vice Chairman of the Board from among the members representative of the general public.

"(3) The term of office of the members of the Board shall terminate on May 1, 1953. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term.

"(4) Each member representative of the general public shall receive compensation at the rate of $15,000 a year, and while a member of the Board shall engage in no other business, vocation, or employment. Each member representative of labor, and each member representative of business and industry, shall receive $50 for each day he is actually engaged in the performance of his duties as a member of the Board, and in addition he shall be paid his actual and necessary travel and subsistence expenses in accordance with the Travel Expense Act of 1949 while so engaged away from his home or regular place of business. The members representative of labor, and the members representative of business and industry, shall, in respect of their functions on the Board, be exempt from the operation of sections 281, 283, 284, 434, and 1914 of Title 18 and 99 of Title 5.

"(5) The Board shall, under the supervision and direction of the Economic Stabilization Administrator—

"(A) formulate, and recommend to such Administrator for promulgation, general policies and general regulations relating to the stabilization of wages, salaries, and other compensation; and

"(B) upon the request of (i) any person substantially affected thereby, or (ii) any Federal department or agency whose functions, as provided by law, may be affected thereby or may have an effect thereon, advise as to the interpretation, or the application to particular circumstances, of policies and regulations promulgated by such Administrator which relate to the stabilization of wages, salaries, and other compensation.

"For the purposes of this Act, stabilization of wages, salaries, and other compensation means prescribing maximum limits thereon. Except as provided in clause (B) of this paragraph, the Board shall have no jurisdiction with

BLEED THROUGH

BLURRED COPY

respect to any labor dispute or with respect to any issue involved therein. Labor disputes, and labor matters in dispute, which do not involve the interpretation or application of such regulations or policies shall be dealt with, if at all, insofar as the Federal Government is concerned, under the conciliation, mediation, emergency or other provisions of laws heretofore or hereafter enacted by the Congress.

"(6) Paragraph (5) of this subsection shall take effect thirty days after the date on which this subsection is enacted. The Wage Stabilization Board created by Executive Order Numbered 10161, and reconstituted by Executive Order Numbered 10233, as amended by Executive Order Numbered 10301, is abolished, effective at the close of the twenty-ninth day following the date on which this subsection is enacted. After June 27, 1952, the present Wage Stabilization Board shall issue no regulation or order except with respect to individual cases pending before the Board prior to such date."

Section 404:

(U. S. C. Sec. 2104)

"In carrying out the provisions of this title, the President shall, so far as practicable, advise and consult with, and establish and utilize committees of, representatives of persons substantially affected by regulations or orders issued hereunder."

Section 409(a) and (b):

(U. S. C. Sec. 2109(a) and (b))

"(a) Whenever in the judgment of the President any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 405 of this title, he may make application to any district court of the United States or any United States court of any Territory or other place subject to the jurisdiction of the United States for an order enjoining such acts or practices, or for an order enforcing compliance with such provision and upon a showing by the President that such person has engaged or is about to engage in

any such acts or practices a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order shall be granted without bond.

"(b) Any person who willfully violates any provision of section 405 of this title shall be guilty of a misdemeanor and shall, upon conviction thereof, be subject to a fine of not more than $10,000, or to imprisonment for not more than one year, or both. Whenever the President has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion cause appropriate proceedings to be brought."

Section 705(b):

(U. S. C. Sec. 2155(b))

"No person shall be excused from complying with any requirement under this section, or from attending and testifying or from producing books, papers, documents, and other evidence in obedience to a subpena before any grand jury or in any court or administrative proceeding based upon or growing out of any alleged violation of this Act on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to penalty or forfeiture; . . ."

Section 709:

(U. S. C. Sec. 2159)

"The functions exercised under this Act shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of section 3 thereof. Any rule, regulation, or order, or amendment thereto, issued under authority of this Act shall be accompanied by a statement that in the formulation thereof there has been consultation with industry representatives, including trade association representatives, and that consideration has been given to their recommendations, or that special circumstances have rendered such consultation impracticable or contrary to the interest of the national defense, but no such rule, regulation, or order shall be invalid

BLEED THROUGH

BLURRED COPY

by reason of any subsequent finding by judicial or other authority that such a statement is inaccurate."

Section 717, as amended 66 Stat. 306:

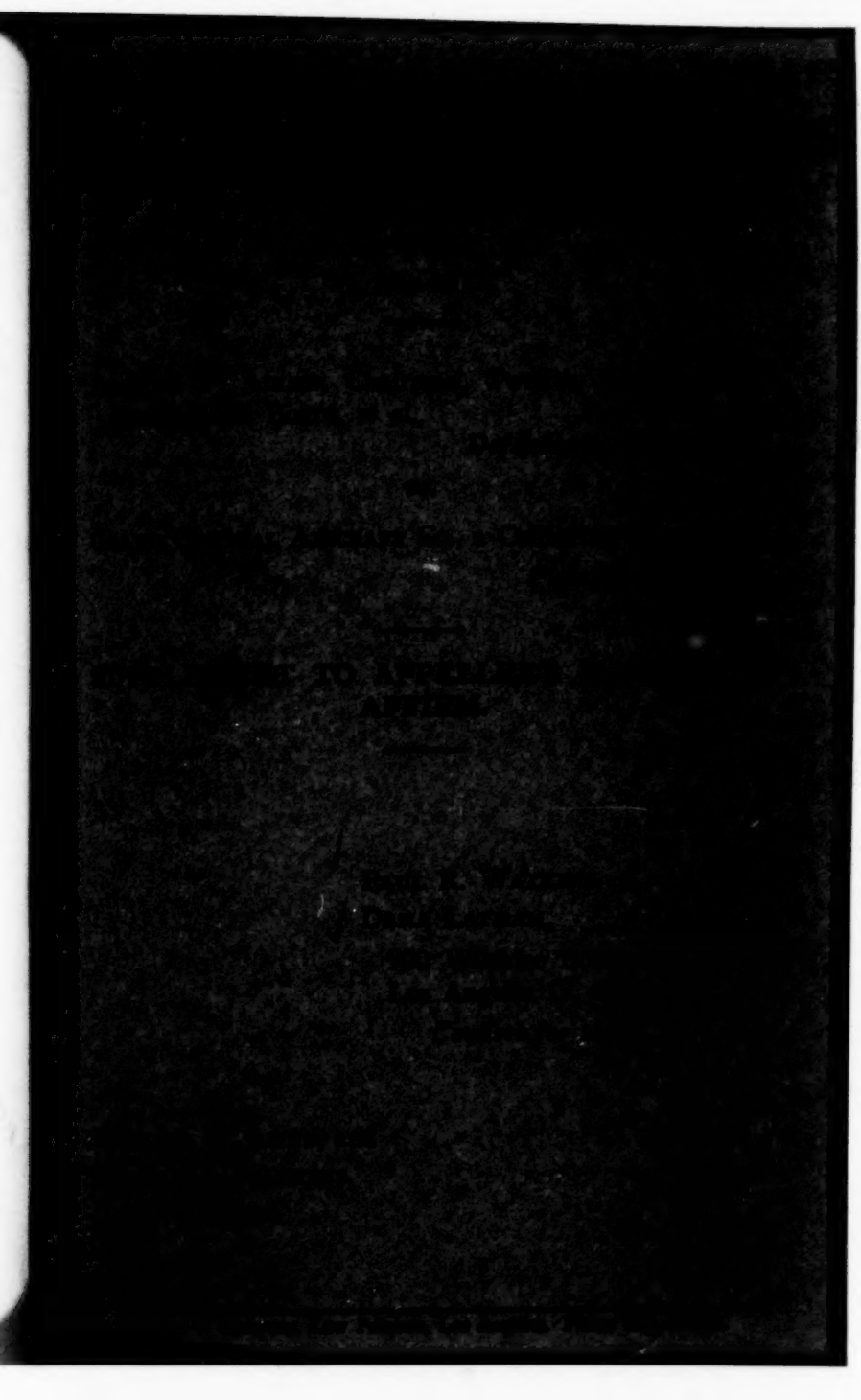
(U. S. C. Sec. 2166(a) and (b))

"(a) Titles I, II, III, VI, and VII of this Act and all authority conferred thereunder shall terminate at the close of June 30, 1953; and titles IV and V of this Act and all authority conferred thereunder shall terminate at the close of April 30, 1953.

"(b) Notwithstanding the foregoing—

• • • • • • •

"(3) Any agency created under this Act may be continued in existence for purposes of liquidation for not to exceed six months after the termination of the provision authorizing the creation of such agency."



BLEED THROUGH

BLURRED COPY

IN THE

Supreme Court of the United States

October Term, 1953
No. 450

ARTHUR P. ALLEN, Chairman, Twelfth Region Wage Stabilization Board, *et al.*,

Defendants-Appellants,

vs.

GRAND CENTRAL AIRCRAFT CO., a California corporation.

Plaintiff-Appellee.

SUPPLEMENT TO APPELLEE'S MOTION TO AFFIRM.

This is a Supplement to Appellee's Motion to Affirm, dated October 9, 1953, and filed as part of its Statement in Opposition to Appellants' Statement of Jurisdiction. It is prompted by this Court's *per curiam* decision, on November 9, 1953, in *Franklin v. Jonco Aircraft Corp.*, No. 323, Oct. T. 1953. The administrative procedures held invalid by the District Court's judgment from which this appeal is taken are the same as those permanently enjoined by the District Court in the *Jonco* case (114 F. Supp. 392, D. C. N. D. Tex., June 14, 1953). That judgment was reversed by this Court in the following language:

> "The appellee having failed to exhaust its administrative remedy, the judgment is reversed. Myers

v. Bethlehem Shipbuilding Corp., 303 U. S. 41. Public Service Commission of Utah v. Wycoff Company, Inc., 344 U. S. 237, 246."

It is respectfully submitted that the *Jonco* case, and the two cases cited in the Court's opinion therein, are distinguishable from this case, for the reasons hereafter stated.

I.

The Myers and Wycoff Cases Do Not Require Exhaustion of Administrative Remedies Here.

The *Myers* case is distinguishable on many grounds, only some of which will be here discussed. The following are clearly sufficient to demonstrate the inapplicability of that case to the instant situation:

(1) The case involved the National Labor Relations Board. The organization, jurisdiction, and procedure of that Board was prescribed by the National Labor Relations Act which specifically granted to that Board "exclusive jurisdiction." In the instant situation, on the other hand, there is no National Enforcement Commission or other agency specifically created by the statute for the purpose of imposing penalties for wage stabilization violations. Indeed, the basis for the District Court's decision herein was that the statute provided that federal district courts should have exclusive jurisdiction in enforcement cases.

(2) Secondly, the National Labor Relations Act spelled out in detail effective court review. Indeed, the administrative order was not self-enforcing and became effective only after a decree of enforcement

BLEED THROUGH

BLURRED COPY

by a Circuit Court of Appeals. As this Court observed (303 U. S. at 48):

> ". . . The grant of that exclusive power is constitutional, because the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board. No power to enforce an order is conferred upon the Board. To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance. And, until the Board's order has been affirmed by the appropriate Circuit Court of Appeals, no penalty accrues for disobeying it."

By way of contrast, in the instant situation there not only is no specific provision in the statute for court review, but such right is in fact negatived by the regulations and orders of the Economic Stabilization Administrator:

> "The Director of Price Stabilization and the National Enforcement Commission shall certify and forward their final determination in each case to the appropriate governmental agency or agencies. Any such determination shall be conclusive on all Executive Departments and agencies of the Government, and they shall disregard and disallow the amounts thus certified. Any determination made pursuant to this authority under the Defense Production Act, as amended, shall be final and not subject to review by the Tax Court of the United States or by any court in any civil proceeding." General Order 15, sec. 6 (17 F. R. 2994, 9977).

> "Whenever there has been a final decision in an enforcement proceeding imposing a disallowance sanction, as defined in Section 1.1 hereof, the National Enforcement Commission shall issue a Certificate of Disallowance setting forth the name and address of the respondent or respondents and the amount which shall be disallowed and disregarded by any Executive Department or other agency or departments or agencies of the government in determining the costs and expenses of the respondent. The certificate of disallowance shall be transmitted by the National Enforcement Commission to the appropriate Executive Departments or other agencies of the government and a copy served upon the appropriate board or office and the respondent. The certificate of disallowance shall be conclusive for the purposes stated therein." General Procedural Regulation No. 1, Revised, sec. 6.1 (17 F. R. 7737).

(3) In the *Myers* case, the principal issue before the Board and the court was whether the complainant was engaged in a business whose operations affected interstate commerce so as to bring it within the scope of the National Labor Relations Act. This was an issue of mixed law and fact which was peculiarly within the expert knowledge of the Board to rule on initially. In the instant situation, however, the issues before the court below involved the validity of certain administrative regulations and orders, which issues the administrative agency was not even competent to rule on! Thus, Section 10.1 of General Procedural Regulation No. 1, Revised, of

BLEED THROUGH

BLURRED COPY

the Economic Stabilization Administrator provided (17 F. R. 7737, 18 F. R. 1663):

> "The Enforcement Commissioner, in making his findings and determinations, and the National Enforcement Commission, in making its decisions, shall, to the extent applicable, be governed by the established regulations, interpretations, and policies formulated by the Board or office involved in the enforcement proceeding."

(4) Finally, in the *Myers* case, there was no real irreparable injury threatened. The complainant merely made a vague claim of the expenses involved in trying the issue before the Board. And yet the complainant was faced with the same expense in proving in an injunction proceeding that it was not engaged in commerce and hence was not subject to the Act. Under all the circumstances, this Court held that in the absence of threatened irreparable injury, the complainant had to exhaust its administrative remedies. Undoubtedly this is the proposition for which this Court cited the *Myers* case in its recent decision in the *Jonco* case. As we shall see below, in the instant case there are substantial elements of real irreparable injury present in addition to heavy costs involved in the administrative hearing.

The *Wycoff* case, *supra*, 344 U. S. 237, 246, 73 S. Ct. 236 (1953), involved a suit for a declaratory judgment that complainant's transportation was in interstate commerce, and for an injunction against a state regulatory commission's interference with complainant's transportation. The trial court's judgment denying the injunction was affirmed because of the complete lack of any evi-

dence as to threatened or probable acts of the defendants which might cause irreparable injury. The denial of declaratory relief was upheld upon the ground, among others, that the complaint sought not an ultimate determination of rights, but only preliminary findings intended to fortify the complainant against future regulation. The Court said the declaratory judgment procedure

> "will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body. . . . It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance. *Cf.* Myers v. Bethlehem Shipbuilding Corp. . . ." (344 U. S. at 246).

This case is inapposite both because appellee here has made a strong showing of injury and because appellee's challenge of the administrative proceeding is based not on issues which can be determined by the agency in the first instance, but rather upon issues which the agency is not entitled to try in any event. The District Court found that the agency has no power to hold hearings, and that it has never had such power. It also found, as discussed below, that an adverse intermediate decision from the agency, issued prior to the agency's final determination, would result in substantial irreparable injury.

BLEED THROUGH

BLURRED COPY

II.

Where the Merits of the Issue Presented by the Attack on the Administrative Proceeding Cannot Be Decided by the Agency and Where Irreparable Injury Is Shown, Exhaustion of Administrative Remedies Is Not Required.

Exhaustion of administrative remedies has not been required by this Court, we submit, where the continuance of the administrative proceeding would cause irreparable injury and where the issue raised by the complaint attacking the proceeding was not one which the agency could decide. For example, in *Public Utilities Commission v. United Fuel Gas Co.*, 317 U. S. 456, 63 S. Ct. 369 (1943), it was found that the challenged orders of an administrative agency were "on their face plainly invalid" because exclusive jurisdiction had been vested in a federal regulatory agency:

> "No inquiry beyond the orders themselves and the undisputed facts which underlie them is necessary in order to discover that they are in conflict with the federal Act." (317 U. S. at 469.)

Accordingly the Court held that under the circumstances, the mere fact that the complainant company would incur expenses in complying with the void orders constituted sufficient irreparable injury to justify an injunction. Among numerous other decisions of this Court sustaining injunctive relief against administrative proceedings where there was irreparable injury threatened, see the following: *Utah Fuel Co. v. National Bituminous Coal*

Comm., 306 U. S. 56, 59 S. Ct. 409 (1938); *Smith v. Cahoon*, 283 U. S. 553, 51 S. Ct. 582 (1931); *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U. S. 196, 44 S. Ct. 553 (1924); *Pennsylvania v. West Virginia*, 262 U. S. 553, 43 S. Ct. 658 (1923); *Oklahoma Gas Co. v. Russell*, 261 U. S. 290, 43 S. Ct. 353 (1923); *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 39 S. Ct. 375 (1919); *Waite v. Macy*, 246 U. S. 606, 38 S. Ct. 395 (1918); *Gonzales v. Williams*, 192 U. S. 1, 24 S. Ct. 177 (1904).

The opinion in *Aircraft & Diesel Equipment Corporation v. Hirsch*, 331 U. S. 752, 67 S. Ct. 1493 (1947), recognized the principle that exhaustion will not be required where the merits of the attack upon the agency are not within its jurisdiction to determine and where there is irreparable injury, in the following words:

> "It is true that the presence of Constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention." (331 U. S. at 773.)

The principle was held not to be applicable to the facts in that case, Justice Douglas dissenting, for two reasons. First, the Court found that Congress had plainly expressed an intention in the governing statute that the administrative remedy, culminating in review *de novo* by

BLEED THROUGH

BLURRED COPY

the Tax Court, was exclusive. In other words, it found the exhaustion rule to have been written into the statute. Here, on the other hand, not only is there no such requirement expressed, but the main point in issue is whether the statute authorized any administrative enforcement procedure at all and whether certain of the applicable regulations and orders are, on their face, in conflict with the statute. Secondly, the Court found that (331 U. S. at 778), "without specific allegation that any of them is seriously so threatened or facts to support such a claim," there was no adequate showing of irreparable injury.

The Government does not appear to dispute the proposition that where real irreparable injury is established, an administrative proceeding will be enjoined and exhaustion of the administrative remedy will not be required. (See Appellants' Statement as to Jurisdiction, filed herein on September 24, 1953, pp. 10-13, typewritten copy.) The Government's claim is only that the trial court erred in finding that appellee would in fact suffer irreparable injury if the proceeding were not enjoined. *Ibid.* But, as discussed below, such finding by a unanimous three-judge court was clearly supported by the evidence.

III.

Appellee Should Not Be Required to Exhaust Its Administrative Remedies in View of the Nature of Its Challenge to Administrative Jurisdiction and the Strong Showing Made of Irreparable Injury.

The principle recognized in the *United Fuel Gas* case and the other cases cited should be applied here. In the first place, the District Court has determined that the National Enforcement Commission was constituted without statutory authority and had no power to hear a complaint against appellee. In other words, the orders of the Economic Stabilization Administrator creating the National Enforcement Commission, and the orders issued pursuant thereto, were "on their face plainly invalid" and no inquiry beyond the orders themselves was necessary in order to discover that they were in conflict with the statute. Nor did the Commission have jurisdiction to determine their validity. Appellee also challenges on other grounds regulations and administrative orders, the validity of which the Commission could not determine.

In the second place, the showing of injury is far more compelling than in any of the cases cited. It is in this respect that the *Jonco* decision is most easily distinguished from this appeal. The opinion of the court below (now reported at 114 F. Supp. 389, 391) summed up the facts showing injury as follows:

> "The undisputed evidence convincingly showed that the plaintiff would be irreparably damaged by the *continuance* of the administrative proceedings. . . . The evidence further showed that the *continuance* of the administrative proceedings with the overhanging threat of the disallowance penalties *would cause the banks to withdraw* the credit extended, re-

BLEED THROUGH

BLURRED COPY

sulting in a shut down of plaintiff's business, cancellation of its government contracts, and consequent bankruptcy." (Emphasis added.)

The evidence supporting this finding, including testimony of an official of one of the participating banks, and a copy of the credit agreement, was introduced at the trial of the case on July 24, 1953, and was undisputed.

Among the exhibits admitted into evidence was the computation of the Regional Counsel of the Wage Stabilization Board showing that total wage payments allegedly paid in violation of regulation amounted to $5,561,484.11. Of this sum, $959,857.50 was computed as the amount of the illegal excess. Under the Economic Stabilization Administrator's General Order 15, Section 4(b) (17 F. R. 2994, 9977), the former amount was subject to disallowance in the absence of a showing of extenuating or mitigating circumstances (as defined therein), and even upon such a showing the latter amount was disallowable, it being provided that if extenuating or mitigating facts were proved, nevertheless,

> "the usual and general policy shall be to disallow an amount at least equal to that portion of any payment or accrual in excess of whatever payment was permissible under the governing regulation, order or determination."

It was established that extensions of bank credit in the amounts then being made under the loan agreement were vital to appellee's continued operation, that such loans were appellee's only assurance that it would have adequate working capital to meet heavy weekly payroll and other recurring expenses. It was shown that the current agreement would expire September 30, 1953. The executive

vice-president of the bank acting as agent for the several banks under the credit agreement, a man responsible for making recommendations to the bank's board of directors regarding loan policy [Tr. p. 40], testified as follows:

"Q. Mr. Lawler, if an enforcement commissioner of the National Enforcement Commission in a proceeding involving the Grand Central Aircraft Company should make findings and determinations that wages in the amount of $5,000,000 or more should be disallowed for income tax and or an alternatively contract reimbursement purposes for the year 1951, what would be your recommendation to the Board of Directors of your bank with reference to the requests from Grand Central Aircraft Company to extend the present credit agreement beyond September 30, 1953?

The Witness: Under those circumstances, sir, I would give a negative recommendation to my Board of Directors with respect to the further extension of credit.

Mr. Lund: Q. By saying 'negative' you mean you would recommend that the bank not extend the credit agreement, is that correct? A. That is correct.

Q. Would that also be true if the enforcement commissioner's findings and determinations was that the amount of such disallowance should be $3,000,000? A. In my opinion, the recommendation should continue to be negative under those circumstances based on the financial condition of the company as I know it at this time.

BLEED THROUGH

BLURRED COPY

Q. And would the same be true if the findings and determinations of the enforcement commissioner was for a disallowance of a million dollars? A. Yes.

Q. Three-quarters of a million dollars? A. Yes, sir." [Tr. pp. 42-43.]

Appellants argue that only the National Enforcement Commission had authority to issue a certificate of tax disallowance, and that there could be no injury resulting from the proceedings before the Enforcement Commissioner. This argument overlooks the degree of finality which attached to the Enforcement Commissioner's determination. As provided in General Procedural Regulation 1, Revised, Section 4.1(f), 17 F. R. 7737, 18 F. R. 1663:

> "If no appeal is filed as hereinafter provided, the findings and determination of the Enforcement Commissioner shall, in the absence of clear and prejudicial error, be adopted by the National Enforcement Commission and a certificate of disallowance based thereon issue to the appropriate departments or agencies of the government."

More significantly, the argument overlooks the effect which such findings and determinations would have on the banks extending credit to appellee. As was shown in the testimony of the executive vice-president of the bank administering the loan, an Enforcement Commissioner's disallowance of any amount from the $5,000,000 maximum claimed, to $750,000, an amount substantially less than the "ordinary and usual" minimum disallowance,

would cause the banks to withdraw the vital credit being extended. Without such credit the appellee would be forced into bankruptcy. The bank's action would be taken despite proposed appeal of the case to the Commission itself.

Of course, it may be argued that an Enforcement Commissioner might decide that there was no violation, and that if he did so the need for any judicial determination of the proper interpretation of the statute, or of its constitutionality, would have been obviated. If the exhaustion rule were to be applied for this reason, then the effect would be to require appellee to gamble on the favorable outcome of an invalid administrative proceeding at the risk of being put out of business. We submit that the decisions of this Court do not require that such a risk be enforced upon appellee.

No showing of irreparable injury comparable to that detailed above supported the injunction in the *Jonco* case. Indeed, as was pointed out in the Government's Statement as to Jurisdiction therein (subd. C(II)), the only basis for the district court's finding of irreparable injury was that court's view that the company might, in the future, be subjected to sanction after a final unfavorable decision by the National Enforcement Commission, the members of which were not before the Court.

Appellants' insistence that an Enforcement Commissioner's findings were subject to appeal is irrelevant in view of the evidence showing that appellee would be bank-

BLEED THROUGH

BLURRED COPY

rupt, and hence unable to take an appeal. Exhaustion of administrative remedies in such circumstances becomes impossible. Hence the question is not properly one of exhaustion, but of whether appellee is to be allowed any court review at all. We submit that the present showing of irreparable injury justifies a determination by this Court that the regulations conferring appellants' claimed authority are invalid.

Dated: November 20, 1953.

Respectfully submitted,

PAUL R. WATKINS,
DANA LATHAM,
Counsel for Appellee.

RICHARD W. LUND, and
LATHAM & WATKINS,
Of Counsel.

MAR 4 1954
HAROLD B. WILLEY, CL

IN THE

Supreme Court of the United States

October Term, 1953
NO. 450

ARTHUR P. ALLEN, Chairman, Twelfth Region Wage Stabilization Board, *et al.*,

Appellants,

vs.

GRAND CENTRAL AIRCRAFT CO., a California Corporation,

Appellee.

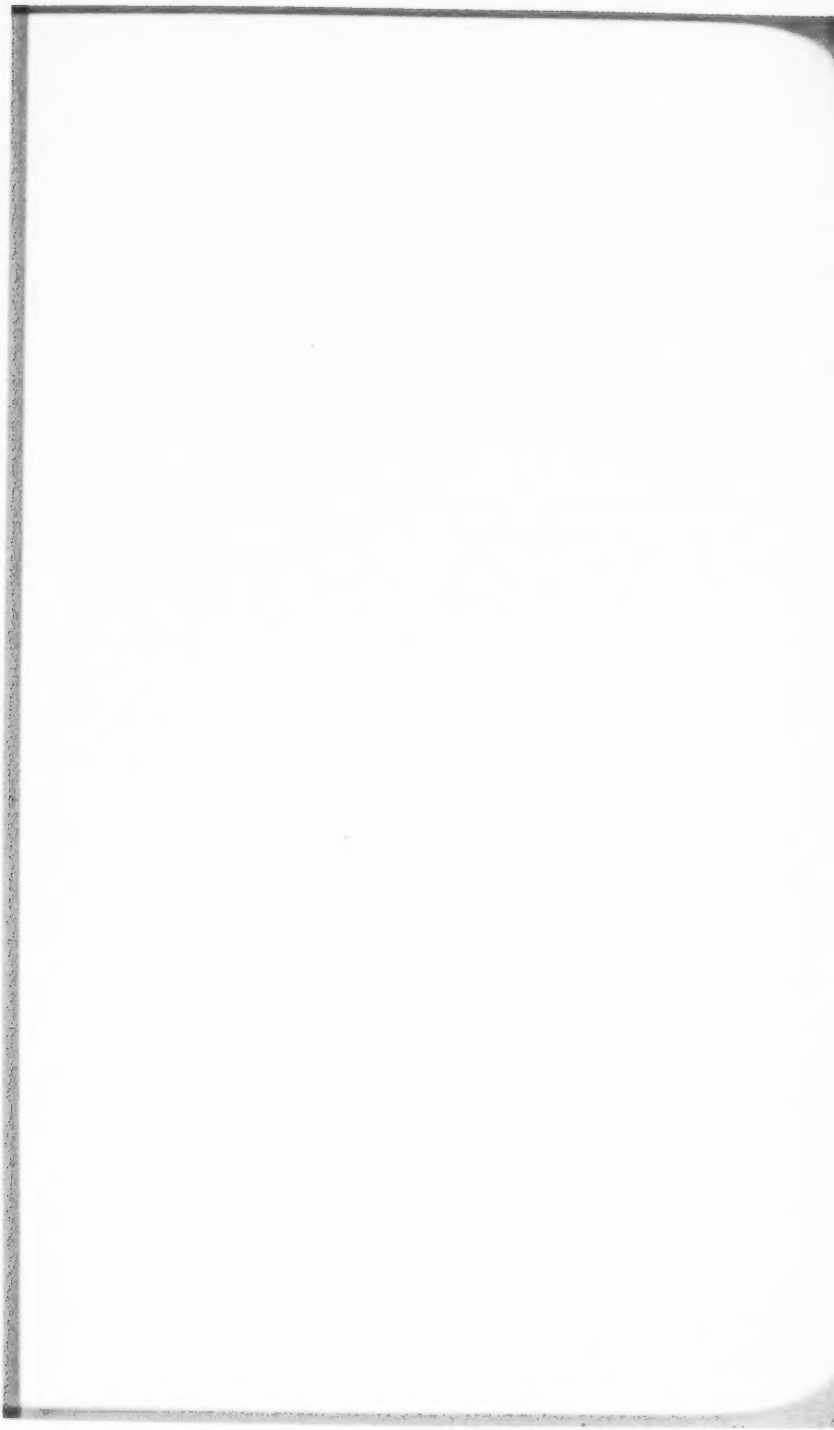
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF APPELLEE.

RICHARD W. LUND,
DANA LATHAM,
PAUL R. WATKINS,
830 Statler Center,
Los Angeles 17, California,
Attorneys for Appellee.

RICHARD F. ALDEN,
GROVER R. HEYLER,
LATHAM & WATKINS,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.



BLEED THROUGH

BLURRED COPY

SUBJECT INDEX

PAGE

Opinion below 1

Jurisdiction 1

Questions presented 2

Statutes and regulations involved 3

Statement 3

Summary of argument 10

Argument 20

I.

The Defense Production Act of 1950 authorized the courts, not the Executive, to determine whether the Act had been violated 20

A. The clear language of the Act places jurisdiction to determine violations in the federal courts 20

B. The legislative history of the Act does not support the Executive's claim to adjudicatory power 35

II.

"All authority" of the Executive and of any administrative agency under the Act expressly terminated on April 30, 1953, except "for purposes of liquidation," which limited authority expired on October 31, 1953 48

A. Under Section 717 of the Act all wage stabilization authority expressly terminated on April 30, 1953, with complete liquidation of any agency required by October 31, 1953 48

B. No authority existed to transfer stabilization functions to the Office of Defense Mobilization 55

C. No savings statute authorizes continuance of the proceedings enjoined 60

PAGE

III.

The regulations and orders under which the agency purports to proceed against appellee are in direct conflict with various provisions of the Act 67

A. The regulations establishing disallowance procedures are invalid under Section 709 because of the absence of a statement of considerations 67

B. The collapse of the Tri-Partite Wage Stabilization Board destroyed the Section 403(b) scheme for administration of wage controls 70

C. In authorizing penalties over and above that part of a wage payment determined to be illegal, the regulations contravened Section 405(b) 73

D. In authorizing the retroactive imposition of penalties, the regulations also were invalid 74

IV.

Title IV of the Defense Production Act of 1950 is unconstitutional 77

A. The Act is invalid under the Fifth Amendment in depriving appellee of its property without due process of law 78

B. The Act is invalid under the Sixth or Seventh Amendments in depriving appellee of the right to a jury trial.. 84

C. The Act is invalid under the Eighth Amendment in authorizing excessive fines 86

D. The Act is invalid under Article I, Section 9, Clause 4 in authorizing an unapportioned direct tax 87

E. The Act is invalid under Article I, Section 1 because of the improper delegation of legislative power to the Executive 88

BLEED THROUGH

BLURRED COPY

PAGE

F. The Act is invalid under the Tenth Amendment in attempting to legislate on matters thereby reserved to the States 90

V.

The District Court had power and jurisdiction to grant, and properly issued, the injunction..... 91

A. The facts proved at the trial support the District Court's finding that appellee would suffer irreparable injury of the kind sufficient to justify enjoining the holding of the administrative hearing..... 91

B. Exhaustion of administrative remedies has not been required where administrative adjudicatory procedure or judicial review is not specifically prescribed by statute.. 98

C. The specific provisions in the regulations prohibiting judicial review of National Enforcement Commission orders are a further ground justifying the injunction herein 102

Conclusion 105

Appendix:

I. Defense Production Act of 1950..... 107

II. Executive Orders and Regulations..... 115

TABLE OF AUTHORITIES CITED

CASES PAGE

A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837 89
Aaron Machinery Co. v. National Enforcement Commission, 24 CCH Lab. Cas., par. 67,869 100
Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752, 67 S.Ct. 1493 ..... 93, 99
Alsop v. Pierce, 155 Fla. 184, 19 So.2d 799 22
Balworth Co., N.E.C. No. 111 (Sept. 1953) 98
Belcher Oil Co. v. National Enforcement Comm'n, 114 F. Supp. 377 ..... 26, 100
Bowles v. Farmers National Bank of Lebanon, 147 F.2d 425 84
Bridges v. United States, 346 U.S. 209, 73 S.Ct. 1055 64
Bruner v. United States, 343 U.S. 112, 72 S. Ct. 581 63
Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855 89
Cohens v. Virginia, 6 Wheat. 264 (U.S. 1820) 60
Collett, Ex parte, 337 U.S. 55, 69 S.Ct. 944 36
Commissioner v. Flowers, 326 U.S. 465, 66 S.Ct. 250 37
Commissioner v. Weisman, 197 F.2d 221 88
Commonwealth v. Old Dominion Power Co., 184 Va. 6, 34 S.E.2d 364 22
County of Upshur v. Rich, 135 U.S. 467, 10 S.Ct. 651 60
Cudahy Packing Co. of Louisiana v. Holland, 315 U.S. 357, 62 S.Ct. 651 56
De La Rama S.S. Co. v. United States, 344 U.S. 386, 73 S.Ct. 381 63
Dooley v. United States, 183 U.S. 154, 22 S.Ct. 62 90
Doyle v. Mitchell Bros., 247 U.S. 179, 38 S.Ct. 467 88
Endo, Ex parte, 323 U.S. 283, 65 S.Ct. 208 37
Estep v. United States, 327 U.S. 114, 66 S.Ct. 423 79
Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552 ..... 99, 101

BLEED THROUGH

BLURRED COPY

PAGE

Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 67 S.Ct. 1129 ..... 37, 56, 59, 62

Forsyth Engineering Co. v. Fleming, 24 CCH Lab. Cas, par. 67,829 100

Franklin v. Jonco Aircraft Corp., 346 U.S. 868, 74 S.Ct. 126 ..... 19, 94

FTC v. Raladam Co., 283 U.S. 643, 51 S.Ct. 587 24

Goldsmith v. Board of Tax Appeals, 270 U.S. 117, 46 S.Ct. 215 ..... 99, 101

Gornelius & Read Co., N.E.C. No. 121 (Sept. 10, 1953) 98

Great Northern Ry. v. United States, 208 U.S. 452, 28 S.Ct. 313 ..... 62, 63

Gross Electric Co., N.E.C. No. 117 (Sept. 14, 1953) 98

Hallowell v. Commons, 239 U.S. 506, 36 S.Ct. 202 63

Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630 86

Helvering v. Winmill, 305 U.S. 79, 59 S.Ct. 45 37

Hertz v. Woodman, 218 U.S. 205, 30 S.Ct. 621 ..... 62, 63

Hillsborough Tp. v. Cromwell, 326 U.S. 620, 66 S.Ct. 445 103

Koenig v. Flynn, 258 N.Y. 292, 179 N.E. 705 22

Leimer v. Woods, 196 F.2d 828 84

Meeker v. Lehigh Valley R.R., 162 Fed. 354 86

Miller v. United States, 294 U.S. 435, 55 S.Ct. 440 76

Missouri Pacific Railway Co. v. Tucker, 230 U.S. 340, 33 S.Ct. 961 83

Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 462 ..... 100, 101

N. A. Woodworth Co. v. Kavanagh, 102 F.Supp. 9; aff'd per curiam, 202 F.2d 154 ..... 40, 73, 81, 86

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615 85

Neuberger v. Commissioner, 311 U.S. 83, 61 S.Ct. 97 24

PAGE

Ng Fung Ho v. White, 259 U.S. 276, 42 S.Ct. 492 79
Norback v. Grand Central Aircraft Co., 345 U.S. 988, 73 S.Ct. 1128 9
Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241 89
Pennsylvania R. Co. v. Labor Board, 261 U.S. 72, 43 S.Ct. 278 100
People ex rel. Lemon v. Elnore, 256 N.Y. 48, 177 N.E. 14 84
Pollack v. Farmers Loan and Trust Co., 157 U.S. 429, 15 S.Ct. 673 87
Public Service Commission of Utah v. Wycoff Company, Inc., 344 U.S. 273, 73 S.Ct. 236 93
Public Utilities Comm'n v. United Fuel Gas Co., 317 U.S. 456, 63 S.Ct. 369 ..... 99, 100
Rice v. Santa Fe Elevator Co., 331 U.S. 218, 67 S.Ct. 1146 99
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 71 S.Ct. 745 37
Sevier v. Riley, 198 Cal. 170, 244 Pac. 323 22
Shapiro v. United States, 335 U.S. 1, 68 S.Ct. 1375 37
Smith-Brooks Co. v. Young, 103 Colo. 199, 85 P.2d 39 22
Smith v. Cahoon, 283 U.S. 553, 51 S.Ct. 582 99
Southwestern Telephone & Telegraph Co. v. Danaher, 238 U.S. 482, 35 S.Ct. 886 79
State v. Seattle Nat'l Bank, 130 Wash. 69, 226 Pac. 259 22
Sullenger, Lela, 11 T.C. 1076 88
Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907 89
Tennessee v. Davis, 10 Otto 257 (U.S. 1880) 61
Troy Laundry Co. v. Wirtz, 155 F.2d 53; cert. den., 329 U.S. 723, 67 S.Ct. 66 40
United States v. Allied Oil Corp., 341 U.S. 1, 71 S.Ct. 544 ..... 59, 62
United States v. Darby, 312 U.S. 65, 61 S.Ct. 451 90
United States v. Jepson, 90 F. Supp. 983 85

BLEED THROUGH

BLURRED COPY

PAGE

United States v. Lindsay, 74 S.Ct. 287 54
United States v. Los Angeles & Salt Lake R. R., 273 U.S. 299, 47 S.Ct. 413 93
United States v. Regan, 232 U.S. 37, 34 S.Ct. 213 85
United States v. Reisinger, 128 U.S. 398, 9 S.Ct. 99 61
United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 53 S.Ct. 42 36
United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 73 S. Ct. 227 ..... 24, 86
Untermyer v. Anderson, 276 U.S. 440, 48 S.Ct. 353 76
Utah Fuel Co. v. National Bituminous Coal Comm'n, 806 U.S. 56, 59 S.Ct. 409 ..... 97, 99
Wadley Southern R. Co. v. Georgia, 235 U.S. 651, 35 S.Ct. 214 79
Wags Transportation Co., N.E.C. No. 88 (Sept. 1953) 98
Waite v. Macy, 246 U.S. 606, 38 S.Ct. 395 ..... 24, 99
Wallace v. Hines, 253 U.S. 66, 40 S.Ct. 435 103
Weather-Seal Mfg. Co. v. Commissioner, 16 T.C. 1312; aff'd mem., 199 F.2d 376 ..... 40, 88
Weems v. United States, 217 U.S. 349, 30 S.Ct. 544 86
West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578 90
Weston v. City Council of Charleston, 2 Peters 449 (U.S. 1829) 60
Wilbur v. United States, 284 U.S. 231, 52 S.Ct. 113 36
Williams v. Fanning, 332 U.S. 490, 69 S.Ct. 188 98
Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660 89
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863 ..... 56, 103

CONSTITUTION AND STATUTES — PAGE

Administrative Procedure Act (60 Stat. 237) 25
Alien Immigration Act (34 Stat. at L. 898, Chap. 1134) 85
Defense Production Act of 1950 (64 Stat. 798) 3, 20, 90
Defense Production Act of 1950, Sec. 401 48
Defense Production Act of 1950, Sec. 402 48
Defense Production Act of 1950, Sec. 403 57
Defense Production Act of 1950, Sec. 403(a) 57, 65
Defense Production Act of 1950, Sec. 403(b) 2, 4, 15, 52, 70
Defense Production Act of 1950, Sec. 403(b)(5) 70
Defense Production Act of 1950, Sec. 404 ..... 15, 67
Defense Production Act of 1950, Sec. 405(a) 28, 30, 31, 88, 104
Defense Production Act of 1950, Sec. 405(b) .....
..... 2, 3, 4, 11, 12, 13, 15, 16, 17, 20
22, 23, 25, 26, 28, 29, 30, 31, 32, 33
35, 38, 41, 42, 43, 47, 48, 49, 50, 52
53, 56, 58, 61, 62, 73, 75, 76, 87, 88
Defense Production Act of 1950, Sec. 407 78
Defense Production Act of 1950, Sec. 408 78
Defense Production Act of 1950, Sec. 408(d) 30
Defense Production Act of 1950, Sec. 408(e) 31
Defense Production Act of 1950, Sec. 409 ..... 28, 31
Defense Production Act of 1950, Sec. 409(b) 11, 53, 54, 86
Defense Production Act of 1950, Sec. 409(d) 28, 29, 31, 56
Defense Production Act of 1950, Sec. 412 49
Defense Production Act of 1950, Sec. 602(b) 25
Defense Production Act of 1950, Sec. 703(a) 56
Defense Production Act of 1950, Sec. 703(a) 13, 56, 58
Defense Production Act of 1950, Sec. 705 33
Defense Production Act of 1950, Sec. 705(a) 33, 35, 61
Defense Production Act of 1950, Sec. 706 31

BLEED THROUGH

BLURRED COPY

PAGE

Defense Production Act of 1950, Sec. 706(b) 2, 3, 4, 11, 12, 25, 26, 27, 41, 42, 45, 47 52, 54, 59, 60, 61, 62, 63, 64, 65, 66, 78
Defense Production Act of 1950, Sec. 708 49
Defense Production Act of 1950, Sec. 709 ..... 2, 4, 7, 12, 14, 25, 67, 68, 69
Defense Production Act of 1950, Sec. 714 49
Defense Production Act of 1950, Sec. 717(a) 13, 49, 58
Defense Production Act of 1950, Sec. 717(b)(3) 13, 45, 50, 53, 59, 64, 65
Defense Production Act of 1950, Sec. 717(c) 65
Emergency Price Control Act of 1942 (56 Stat. 33) 42
Emergency Price Control Act of 1942, Sec. 205(c) 42
Fair Labor Standards Act of 1938 (52 Stat. 1060) 44
First War Powers Act of 1941, Sec. 1 59
General Savings Statute (61 Stat. 635) 62
Sherman Act (38 Stat. 731 (1890)) 86
Stabilization Act of Oct. 2, 1942 (56 Stat. 765) 42, 81, 90
Stabilization Act of 1942, Sec. 5(a) 38, 41, 42, 73, 87
Supplemental Appropriations Act of 1954 (67 Stat. 418) 38
United States Code, Title 1, Sec. 109 (Supp. V, 1952) 62
United States Code, Title 5, Secs. 1001 et seq. (1946) 25
United States Code, Title 15, Sec. 15 86
United States Code, Title 28, Sec. 1253 1
United States Code, Title 29, Secs. 201 et seq. (1946) 44
United States Constitution, Art. I, Sec. 1 ..... 17, 89
United States Constitution, Art. I, Sec. 8 90
United States Constitution, Art. I, Sec. 9, Clause 4 ..... 17, 87
United States Constitution, Fifth Amendment 17, 79
United States Constitution, Sixth Amendment 17
United States Constitution, Seventh Amendment 17, 85

PAGE

United States Constitution, Eighth Amendment.....18, 87
United States Constitution, Tenth Amendment.....17, 90
United States Constitution, Sixteenth Amendment..... 87
War Labor Disputes Act of June 25, 1943 (57 Stat. 163)..... 40

EXECUTIVE ORDERS AND REGULATIONS

Executive Order No. 9809 (11 Fed. Reg. 1428)..... 58
Executive Order No. 10161 (15 Fed. Reg. 6105).....39, 58
Executive Order No. 10233 (16 Fed. Reg. 3503)..... 52
Executive Order No. 10434 (18 Fed. Reg. 809)..... 61
Executive Order No. 10494 (18 Fed. Reg. 6585).....53, 54, 55, 69
Economic Stabilization Administrator's General Order No. 18 (17 Fed. Reg. 6925)..... 43
Economic Stabilization Agency General Order No. 19 (17 Fed. Reg. 11368) 52
General Administrative Order I-2 (18 Fed. Reg. 6966).....69, 81
General Order No. 15 (17 Fed. Reg. 2994, 9977).....
.....5, 6, 21, 68, 73, 75, 78, 82, 83, 94
General Order No. 15, Sec. 3..... 75
General Order No. 15, Sec. 4(b) 73, 94
General Order No. 15, Sec. 6..... 80
General Order No. 19 (17 Fed. Reg. 11368).....7, 72
General Procedural Regulation No. 1, Revised, Sec. 4.1.....6, 96
General Procedural Regulation No. 1, Revised, Sec. 5.2(c).....6, 80
General Procedural Regulation No. 1, Revised, Sec. 6.1.....6, 80
General Procedural Regulation No. 1, Revised, Sec. 10.1.....6, 98
General Procedural Regulation No. 1, Revised (17 Fed. Reg. 7737) 5, 68, 82, 96, 98
General Wage Regulation 5, Feb. 12, 1951 (16 Fed. Reg. 1507) 24

BLEED THROUGH

BLURRED COPY

LEGISLATIVE MATERIALS PAGE

B. N. A. Wage-Hour Rep. (1952), pp. 1609, 1619, 1624 52
96 Congressional Record, pp. 12133, 12480, 14072-14073 79
97 Congressional Record, p. 7692 39
99 Congressional Record (Daily Ed.), July 30, 1953, p. 10712 47
Fourth Intermediate Report of the Select Committee to Investigate Executive Agencies, pursuant to H. Res. 102, 78th Cong., 2d Sess., pp. 6, 11 39
Hearings Before Senate Committee on Appropriations on Supplemental Appropriation Bill, H. R. 6200, 83d Cong., 1st Sess., 424-34 (1953) 45, 66
House Report No. 639, 82d Cong., 1st Sess. 28-29 32
House Report No. 2352, 82d Cong., 2d Sess. 23 (1952) 71
House Report No. 3042, 81st Cong., 2d Sess. 37 (1950) 28
Senate Report No. 470, 82d Cong., 1st Sess 32
Senate Report No. 677, 83d Cong., 1st Sess., 17 (1953) 45
Senate Report No. 1599, 82d Cong., 2d Sess. 28 (1952) 71
Senate Report No. 2250, 81st Cong., 2d Sess. 11 34

MISCELLANEOUS

7 Labor Relations Reporter, pp. 100:1151-64 43
1 Termination Report of the National War Labor Board (1946), pp. 430-431 40
United States Department of Labor Bulletin No. 1009 (1950), pp. 243, 362, 365, Problems & Policies of Dispute Settlement & Wage Stabilization During World War II 40
United States Department of Labor Bull. No. 1009 (1950), p. 354, Problems & Policies of Dispute Settlement & Wage Stabilization During World War II 39
Wage Stabilization Press Release WSB-273, Sept. 11, 1952, Interpretation Bulletin No. 22, Oct. 1, 1952, par. 5B4-5 (7 LRR-WHM 100: 412i) 24
2 Webster's New International Dictionary 1954 (2d Ed., Unab., 1947) 22

BLEED THROUGH

BLURRED COPY

IN THE

Supreme Court of the United States

October Term, 1953

NO. 450

ARTHUR P. ALLEN, Chairman, Twelfth Region Wage Stabilization Board, *et al.*,

Appellants,

vs.

GRAND CENTRAL AIRCRAFT Co., a California Corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF APPELLEE.

OPINION BELOW.

The July 31, 1953 opinion of the trial court—the statutory three-judge United States District Court for the Northern District of California, Southern Division [R. 33-36]—is reported at 114 F. Supp. 389.

JURISDICTION.

The jurisdiction of this Court is invoked under 62 Stat. 926, 28 U.S.C. § 1253. This Court, on January 4, 1954, noted probable jurisdiction [R. 41]. ..... U.S. ....., 74 S.Ct. 309.

QUESTIONS PRESENTED.

1. Whether jurisdiction to find violations of wage stabilization regulations was lodged in the federal district courts under Section 706(b) of the Defense Production Act of 1950 or was authorized by Section 405(b) to be delegated to an administrative agency.

2. Whether, even assuming that while it was in effect the Act authorized administrative determinations of violations, when all authority conferred by the Act (including authority of the agency created to make such determinations) expressly terminated, the Executive had authority to transfer the functions of such liquidated agency to some other agency and thereby continue administrative hearings to determine alleged violations.

3. Whether the regulations and orders creating the administrative agency and under which it purported to act contravened the statute in that (a) they contained no statement of considerations required by Section 709 of the Act; (b) they were sought to be implemented notwithstanding the non-existence of the Wage Stabilization Board created by Section 403(b); (c) they authorized a disallowance penalty for violations, contrary to Section 405(b), greater than the amount of the wage which exceeded the legal maximum; and (d) they authorized the imposition of penalties for periods prior to the issuance of the order prescribing the penalty.

4. Whether the Act violates various provisions of the Constitution in imposing wage stabilization controls and in authorizing the President by Section 405(b), without any controlling standards, to prescribe the penalty for violation and permitting (as Appellants contend) a penalty of disallowance for income tax purposes, equal to the

BLEED THROUGH

BLURRED COPY

amount of the total violative wages paid, to be administratively determined and imposed without any opportunity for judicial review of such determination.

5. Whether, in view of the irreparable injury Appellee would otherwise suffer, the District Court properly enjoined the Appellants from holding an administrative hearing to try Appellee upon allegations it had violated Section 405(b) of the Act.

STATUTES AND REGULATIONS INVOLVED.

The pertinent statutes and regulations, except to the extent they are quoted in the Appendix to the Brief for Appellants (pp. 78-103), are set forth in the Appendix attached hereto (*infra,* pp. 107-119).

STATEMENT.

To avoid unduly extending this brief, we will not repeat herein the statement of facts related in the Appellants' Brief (pp. 2-14). However, certain additional legislative and regulatory provisions and pertinent facts will be briefly related.

Statutory provisions. The Defense Production Act of 1950 (64 Stat. 798, 50 U.S.C. App. §§ 2061 *et seq.* (Supp. V 1952)) contained additional material provisions which the Court should have before it at the outset of its consideration of this case. Section 706(b) provided in part:

> "The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this Act or any rule, regulation, order, or subpena thereunder, and of all civil actions under this Act to enforce any liability

or duty created by, or to enjoin any violation of, this Act or any rule, regulation, order or subpena thereunder."

Except as covered by the above provision or Section 405(b) itself (Aplts. Br. p. 3), the Act contained no authorization for the imposition of the penalty, permitted to be prescribed under Section 405(b), for violations of wage stabilization regulations.

Section 709 provided that, "Any rule, regulation, or order" issued under the Act "shall be accompanied by a statement that in the formulation thereof there has been consultation with industry representatives, including trade association representatives, and that consideration has been given to their recommendations."

By Section 403(b), adopted in 1952, a Wage Stabilization Board was created, to be "composed in equal numbers, of members representative of the general public, members representative of labor, and members representative of business and industry." The members of the Board were to be appointed by the President "by and with the advice and consent of the Senate." The Board was directed to formulate and recommend to the Economic Stabilization Director general policies and regulations relating to the stabilization of wages and salaries and "advise as to the interpretation . . . of policies and regulations promulgated by such Administrator."

The Defense Production Act of 1950 also had its own "savings clause." In this regard, Section 706(b) provided:

". . . The termination of the authority granted in any title or section of this Act, or of any rule,

BLEED THROUGH

BLURRED COPY

regulation, or order issued thereunder, shall not operate to defeat any suit, action, or prosecution, whether theretofore or thereafter commenced, with respect to any right, liability, or offense incurred or committed prior to the termination date of such title or of such rule, regulation, or order."

Regulations. General Order No. 15 (17 Fed. Reg. 2994, 9977), paraphrased by Appellants (pp. 5-7), provided that the total illegal wage shall be disallowed for tax and other purposes, except that where there were "extenuating and mitigating circumstances," the "usual and general policy shall be to disallow" the illegal excess, that is, the amount of the wage that exceeded the legal maximum. In the instant case, the Appellants have not admitted or conceded that in Appellee's situation there were any extenuating or mitigating circumstances. Though not issued until many months after the wage "freeze" of January 26, 1951, General Order 15 provided that the penalty prescribed would be applicable to wages paid "at any time" (that is, as early as January 26, 1951) in violation of the regulations.

With reference to the provisions of General Procedural Regulation No. 1, Revised (17 Fed. Reg. 7737, 18 Fed. Reg. 1663), summarized by Appellants at pages 8-10, it should be noted that the so-called recommendations of the Enforcement Commissioner constituted a binding determination which was final unless appealed. In the absence of such an appeal, or "clear and prejudicial error," the National Enforcement Commission was required to adopt his Findings and Determination and issue a certificate of disallowance, based thereon, to the appropriate

executive departments. In this connection the regulation provided (Section 4.1):

> "(e) The Enforcement Commissioner shall file the original and two copies of his findings and determination with the National Enforcement Commission and cause a copy thereof to be served upon each of the parties. Upon the filing of the findings and determination, the case will be transferred to the National Enforcement Commission. . . .
>
> "(f) If no appeal is filed as hereinafter provided, the findings and determination of the Enforcement Commissioner shall, in the absence of clear and prejudicial error, be adopted by the National Enforcement Commission and a certificate of disallowance based thereon issue to the appropriate departments or agencies of the government."

Other pertinent provisions of this regulation are as follows:

> Section 5.2(c): "The findings and determination of the National Enforcement Commission shall be final."
>
> Section 6.1: ". . . The certificate of disallowance shall be conclusive for the purposes stated therein."
>
> Section 10.1: "The Enforcement Commissioner, in making his findings and determination, and the National Enforcement Commission in making its decisions, shall, to the extent applicable, be governed by the established regulations, interpretations, and policies formulated by the Board or Office involved in the enforcement proceeding."

Neither General Order 15, General Order 18, 17 Fed. Reg. 2994, 9977 (which established the National Enforce-

BLEED THROUGH

BLURRED COPY

ment Commission of the Economic Stabilization Agency), nor General Procedural Regulation No. 1, Revised contained a "statement of considerations" such as that prescribed by Section 709 of the Act.

While the President appointed members to the Wage Stabilization Board created by the Defense Production Act of 1950, he did not submit the names of such appointees to the Senate for approval. When the President, late in 1952, "reversed" the Economic Stabilization Administrator and the Wage Stabilization Board by approving a wage increase for the coal miners which the Administrator and the Board had held was unapprovable under the existing wage stabilization policies, the chairman (a public member) and the industry members resigned from the Board on December 6, 1952. The President did not appoint any other industry members to fill these vacancies. Instead, by General Order 19 of December 15, 1952, 17 Fed. Reg. 11368, he purported to create an all public member Wage Stabilization Committee to carry on the functions of the Wage Stabilization Board.

Controversy here involved. Long after the Wage Stabilization Board inspected the books and records of Appellee in August of 1951 relative to possible wage stabilization violations [R. 76], on November 4, 1952, the Board issued and filed with the National Enforcement Commission a complaint against Appellee [R. 3, 10, 37]. Therein the Board, with reference to all Appellee's employees subject to the jurisdiction of the Wage Stabilization Board, alleged merely that between January 26, 1951 and January 1, 1952 Appellee "granted wage increases

. . . ., all of which increases were contrary to Wage Stabilization Regulation 1" [R. 3, 10, 37].

On January 28, 1953, in the administrative proceeding, Appellant Norback, Regional Counsel of the Wage Stabilization Board, submitted to Appellee and the Enforcement Commissioner his computation of the amount of wages allegedly paid by Appellee in violation of wage stabilization regulations [R. 46-48, 61, 77-78]. This computation disclosed a total of asserted illegal wages paid amounting to $5,561,484.11, and an illegal excess, that is the amount of wages paid over and above the claimed permissible, of $755,305.50 [R. 46-48, 61, 77-78].[1]

In January, 1953, Appellee moved Enforcement Commissioner Neal to dismiss the complaint upon grounds substantially identical with those relied upon herein [R. 4, 37]. This motion was denied by Appellant Neal on or about February 11, 1953, upon the ground that he was without power to rule on the constitutionality of the Defense Production Act or on the validity of the regulations promulgated thereunder [R. 4, 37]. The injunction com-

---

[1]The document submitted by Appellant Norback [Pltf's. Exh. "B"; R. 77-78, 46-48, 61] contained certain mathematical errors. Under the heading 2,B, the increase for a 40-hour week was $5.96 (40 X $1.49), not $7.96 as shown, and for the 40 weeks was $238.40. This figure, multiplied by the number of employees receiving such increases (1741—the total of the listed "Increased in March 1951" —and not the erroneous figure used of 1946) yields a total excess on the March increases of $415,054.40 (in correction of the $619,606.40 shown). Using this figure on the Recapitulation [R. 78], the grand total of the alleged illegal excess is $755,305.50.

BLEED THROUGH

BLURRED COPY

plaint here involved was filed two days later, on February 13, 1953 [R. 10, 34].

In the trial of this case on July 24, 1953, the evidence established as part of the irreparable injury, that should the Enforcement Commissioner in the administrative proceeding against Appellee determine a tax disallowance equal to the asserted illegal excess (which, under the standards in General Order 15 would be the usual disallowance even though he found extenuating and mitigating circumstances), the banks would withdraw the credit extended to Appellee [R. 63-64, 46-48, 61, 77-78] thereby immediately forcing Appellee to go out of business [R. 55-56]. And this would be true notwithstanding asserted rights of appeal of that decision to the National Enforcement Commission. The nature of Appellee's operations was such that it needed to receive weekly bank loans in order to meet its weekly payrolls [R. 53-54]. Based upon these and other facts, the trial court found that Appellee would suffer immediate irreparable injury if the administrative proceedings were allowed to continue and in view of the illegality of that proceeding, the permanent injunction was granted [R. 31-37].[2]

---

[2]With reference to the Motion to Vacate Temporary Restraining Order filed by the Appellants with the District Court on April 3, 1953 [R. 16], referred to by Appellants at page 13, footnote 11, the Appellants repeated the same arguments in the Application for Stay of Interlocutory Injunction filed by them in this Court on June 5, 1953. See Objections of Respondent to Application for a Stay of Interlocutory Injunction and Request for Oral Argument in *Norback v. Grand Central Aircraft Co.*, October Term, 1952. The Appellants' application was denied on June 15, 1953. 345 U.S. 988, 73 S.Ct. 1128.

SUMMARY OF ARGUMENT

I.

In February of 1953, the Appellants were about to commence and hold an administrative hearing involving Appellee upon allegations that it had granted wage increases in violation of General Wage Stabilization Regulation No. 1, the so-called wage "freeze" order of January 25, 1951. The wage increases challenged, denominated upon Appellee's records as "merit" increases [R. 4], were given principally in February and March of 1951, during a period when the Wage Stabilization Board was temporarily inoperative because of the resignation of the labor members therefrom.

Acting under various regulations and directives, Appellant Norback and others were about to "try" Appellee on these allegations before Appellant Neal, an Enforcement Commissioner of the National Enforcement Commission, seeking a determination that Appellee had violated the regulations, and a disallowance of the amount of the claimed illegal wages as a cost of operation under the federal income tax and other laws.

Appellee sought to enjoin the hearing and proceeding before the Enforcement Commissioner because of the unconstitutionality of the Act and the invalidity of the governing regulations under the statute and because the Act did not even authorize any determination by an administrative agency as to whether an employer had violated the Act.

At the threshhold, then, is the basic question whether the Appellants had any authority to proceed against Appellee in an administrative forum to determine if it had violated the stabilization regulations.

BLEED THROUGH

BLURRED COPY

Section 706(b) of the Act lodged in the federal district courts jurisdiction of "violations" of the Act and regulations and all actions to "enforce any liability" under the Act and regulations. It also provided that such actions were to be under the supervision and control of the Attorney General. As the trial court held, it was only under this express provision that jurisdiction was created in any tribunal to determine whether an employer had violated the Act and enforce the liability for such a violation.

The Appellants now assert that authorization to administratively determine the question of violation was granted by Section 405(b) of the Act, which, after prohibiting payments in contravention of the regulations, concluded:

> ". . . The President shall also prescribe the extent to which any wage, salary, or compensation payment made in contravention of any such regulation or order shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation."

This is, to say the least, strange language to be used if Congress intended thereby to authorize an administrative adjudication of violations, without the usual right to a jury trial and other safeguards in the judicial process. Particularly is this true in view of the heavy potential penalties permitted under the regulations (several millions of dollars in the instant case as contrasted with the maximum fine of $10,000 permitted under Section 409(b) in case of willful violations) and the absence (Section

709) of even the minimum protection afforded by the Administrative Procedure Act. Clearly Section 405(b) does not permit even an inference that Congress intended to authorize the imposition of such penalties by extra-judicial processes.

The language "prescribe the extent to which" only authorized the President to issue a general regulation as to the extent wages found by the appropriate tribunal to have been illegally paid were to be disregarded by the executive departments. The normal, accepted meaning of "prescribe" is, "to lay down authoritatively as a guide, direction, or rule of action." The section only confers regulatory, as distinguished from adjudicatory power. And this regulatory power was in fact exercised when the standards for disallowance were prescribed in General Order 15.

Recognizing the absence of any language in the Act which, even by reasonable inference, authorizes executive adjudication of violations, the Appellants rely most heavily upon the practice under the Stabilization Act of 1942. It is true that that Act did contain a section comparable to Section 405(b) of the Defense Production Act of 1950, and that the practice (though of doubtful validity) was followed under the earlier Act of determining violations administratively. However, the short and conclusive answer to this alleged analogy is that the Stabilization Act of 1942 did not contain any provisions comparable to Section 706(b) of the Defense Production Act of 1950 which placed jurisdiction over the determination of violations in the federal courts.

BLEED THROUGH

BLURRED COPY

II.

Even if it were possible to interpret Section 405(b) as authorizing an administrative adjudication of violations while it was in effect, the Executive would no longer have power to try Appellee or any other alleged violator in view of the expiration of the law. Under Section 717(a) of the Act, Title IV (which included Section 405(b)) "and all authority conferred thereunder" expressly terminated April 30, 1953. Any agency created under the Act was permitted to be continued thereafter "for purposes of liquidation," but only up to October 31, 1953 (Section 717(b)(3)). Thus, since that latter date there has not only been no Act in existence authorizing the imposition of any penalty, but no administrative agency could lawfully exist after that date.

The Appellants assert that administrative proceedings against Appellee can be continued under the Office of Defense Mobilization, to which the powers and authority under Title IV were purportedly transferred. But this attempted transfer is not authorized by any law and is therefore illegal and void. Section 703(a) of the Act, which is still in effect, does authorize delegation of powers. However, it only permits the President to delegate any "power or authority conferred upon him by the Act," and as of May 1, 1953 Title IV did not confer any power upon him relative to wage stabilization.

Nor does the General Savings Statute here apply. It, of course, cannot create and maintain an administrative agency, nor does it authorize transfer of functions from one agency to another. In any event, it is inapplicable because the later Defense Production Act contained its own savings clause, which, however, maintained liability

only in any "suit, action, or prosecution" and did not save any liability in an administrative proceeding.

Congress clearly intended that stabilization controls, for which it had no great sympathy from the beginning, and the administration thereof should be wound up entirely and concluded as soon as possible after April 30, 1953 and in any event not later than October 31, 1953. It did not want anything whatsoever to be left over from that program beyond the latter date. This is shown by its action in connection with the Supplemental Appropriations Act, 1954, when on August 3, 1953 it appropriated the stabilization agency just enough funds to close its offices in that month.

III.

Again upon the assumption that the Act authorized administrative determination of violations and even upon the further assumption that such authority continued after October 31, 1953, the administrative proceeding would be illegal. This is so because the basic regulations under which the agency purports to have power to act are in conflict with various provisions of the Act; they are therefore invalid, and this vitiates the entire proceeding.

These procedural regulations and orders are in conflict with the Act in the following respects:

(a) Under Section 709 of the Act, Congress required that "any rule, regulation or order . . . issued under authority of this Act *shall be* accompanied by a statement that in the formulation thereof there has been consultation with industry representatives . . . and that consideration has been given to their recommendations" (emphasis added). This provision expressed the Con-

BLEED THROUGH

BLURRED COPY

gressional intent (compare Sec. 404), in an attempt to make undesirable controls acceptable, to give those to be affected by the program an opportunity to advise the administrative agency in the promulgation of all regulations. Yet, General Order 15 (setting forth the standards for disallowance), General Order 18 (establishing the National Enforcement Commission), and the General Procedural Regulation No. 1 (specifying the procedures to be followed in disallowance proceedings)—all of which were adopted under the proposed administration by the Office of Defense Mobilization—did not contain the required statements of consideration and are, therefore, invalid.

(b) By the 1952 amendments to the Defense Production Act of 1950 Congress created (Section 403(b)) a statutory tri-partite Wage Stabilization Board, with primary responsibility for administration of the wage stabilization program, under the supervision and direction of the Economic Stabilization Agency. From and after December 6, 1952, when the chairman and industry members resigned, there was no such board. Thereafter, by General Order 19 an attempt was made, contrary to the mandate of the statute, to lodge its powers in an all public member Wage Stabilization Committee.

(c) Section 405(b) authorized the President to prescribe the extent to which "any wage . . . payment made in contravention of any such (stabilization) regulation" shall be disallowed. But General Order 15 went further and provided that not only the payment in contravention, but the entire wage paid, including that part which was in excess of the permissible wage, was to be considered as illegal and subject to disallowance.

(d) Finally, while Section 405(b) contained no language permitting the retroactive specification of the penalty, by General Order 15 it was provided that the illegal wages to be disallowed could even include those paid prior to the time that the order was issued, as far back as January 26, 1951.

IV.

Under Section 405(b) of the Act, Congress delegated to the President the authority to prescribe the extent to which payments in violation of wage stabilization should be disallowed as a cost deduction under the income tax and other laws. Congress failed, however, to specify any standards to control the exercise of this power. Thus, it left him free to impose any arbitrary standard he chose, such as basing the amount of the penalty on the industry of the employer, the number of employees, the employer's geographic location, and so on. The President did in fact impose an arbitrary test (which we will assume, for purposes of the present argument, was authorized by the statute). That standard was, basically, the total wage paid when any part thereof was illegally raised. (Disallowance of anything less was permitted only when there were extenuating and mitigating circumstances.)

Thus, the penalty prescribed was unrelated to the seriousness of the violation or to any other fair test. To illustrate, assume two employers under the identical circumstances each illegally increased the wages of the same number of employees ten cents an hour. With the increase,

BLEED THROUGH

BLURRED COPY

the base rate of each of the employees of the ABC Company was $1.00, whereas the base rate of the employees of XYZ Company, which had always prided itself in paying a good wage, was $2.00 an hour. The total wages to be disallowed for the identical violation would be twice as great in the case of the XYZ Company! Nor is that all. If we further assume that the ABC Company had an income tax loss in the year in question at least as great as the amount of the disallowance, and that the XYZ Company was subject to the excess profits tax, the former would in fact suffer no penalty since the disallowance would not cause it to pay any income tax whereas the latter could have its income tax increased 82¢ for each dollar of disallowance! Moreover, as illustrated by the instant case, the President claimed the power under the Section to impose a disallowance penalty of millions of dollars on an alleged individual violator. Further, it is claimed that he had authority to assess such a penalty in an administrative proceeding without a jury trial, and without allowing any judicial review of his determination.

In thus authorizing the President to institute wage stabilization controls and to impose the penalty claimed for violations of such controls, we submit the Defense Production Act of 1950, and particularly Section 405(b) thereof, contravenes the following provisions of the Constitution: Article I, Section 1; Article I, Section 9, clause 4; and the Fifth, Sixth or Seventh, Eighth, and Tenth Amendments.

V.

While the trial court based its decision on the ground that the Act placed jurisdiction in the federal courts and not any agency (Point I, above), and therefore found it unnecessary to rule on the other issues raised, the invalidity of the proceedings on any one of the four principal grounds heretofore discussed requires an affirmance of the decree below.

Appellants argue that no injunction should have been granted because Appellee failed to exhaust its administrative remedy. But here there was no valid administrative remedy to pursue, let alone exhaust. The so-called exhaustion principle is not applicable at all where, as here, the administrative agency has no authority under the statute to hold any hearing, or the statutory authority has expired, or the regulations and orders under which the agency purports to proceed are otherwise invalid as being in conflict with the statute and unconstitutional. Moreover, the exhaustion argument is particularly inapplicable where the agency, by its own governing regulations asserts, as in the instant case by General Order No. 15, that after exhaustion of the administrative proceeding its decision may not be reviewed in any court.

Further, Appellee has in fact exhausted any so-called administrative remedy. The Enforcement Commissioner was enjoined from holding or hearing only after he had denied Appellee's motion to dismiss the proceeding based on the grounds later urged to the court. Also, the regulations of the National Enforcement Commission, as it

BLEED THROUGH

BLURRED COPY

has held in a number of cases, specifically preclude it from considering such issues.

Finally, and in any event, irreparable injury, as Appellants recognize (p. 17), "is sufficient to make the doctrine of exhaustion of remedies inapplicable." There is such irreparable injury here, proved beyond question upon trial. Thus, aside from other evidence of irreparable injury, the record establishes that the nature of Appellee's operations is such that it is dependent upon weekly bank loans to meet its payroll and that if the administrative hearing had been permitted to continue and the Enforcement Commissioner had made findings supporting the allegations of the complaint and determined that the alleged illegal excess wage, or any greater amount, be disallowed for income tax purposes, the banks would have withdrawn their credit and Appellee could not have continued its operations. So, even assuming, contrary to the established facts, that Appellee would then have been financially able to appeal the Enforcement Commissioner's decision, and further assuming that it could ultimately obtain court review of the agency's decision, the damage would have been done. In this respect the instant case is basically distinguishable from *Franklin v. Jonco Aircraft Corp.*, 346 U.S. 868, 74 S.Ct. 126 (1953) and all of the other cases which have enjoined National Enforcement Commission hearings. Under all these circumstances the trial court properly enjoined the illegal and invalid administrative hearing and the decree should be affirmed.

ARGUMENT.

I.

The Defense Production Act of 1950 Authorized the Courts, Not the Executive, to Determine Whether the Act Had Been Violated.

A. The Clear Language of the Act Places Jurisdiction to Determine Violations in the Federal Courts.

The Appellants assert that under the Defense Production Act of 1950 (64 Stat. 798, 50 U.S.C. App. §§ 2061 *et seq.* (Supp. V 1952)) the President has the authority and power to adjudicate whether an employer has violated wage stabilization regulations issued under Title IV of the Act. This alleged authority he purportedly delegated to an administrative agency, the National Enforcement Commission. The statutory three-judge district court held that the Act does not confer such an adjudicatory power on the Executive but places solely in the federal courts the jurisdiction to determine violations of the Act [R. 33-37].

1. *Section 405(b) merely authorizes the Executive to prescribe by general regulations the measure of disallowance by the executive departments.* The asserted source of authority of the National Enforcement Commission to pass judgment on alleged violators is contained in Section 405(b) of Title IV of the Act (64 Stat. 798, 807 (1950), 50 U.S.C. App. § 2105(b) (Supp. V 1952)), which provides:

> "No employer shall pay, and no employee shall receive, any wage, salary, or other compensation in contravention of any regulation or order promulgated by the President under this title. The President shall also prescribe the extent to which any wage, salary, or compensation payment made in contraven-

BLEED THROUGH

BLURRED COPY

> tion of any such regulation or order shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation."

This Section, it is submitted, cannot possibly be interpreted as lodging with the Executive power to try alleged violators and adjudge whether they did or did not contravene the Act or the regulations.

The second sentence of this Section delegated to the President only the authority to prescribe by general regulation what part of wage payments duly found to have been made in violation of the Act or regulations should be disregarded by the other executive departments in determining the employer's costs or expenses under other laws. Acting under the authority of this sentence, the President, by the Economic Stabilization Administrator, did issue such a general regulation. General Order 15 of Economic Stabilization Administrator, issued April 3, 1952, 17 Fed. Reg. 2994, 9977 (Aplts. Br. Apdx. pp. 89-93). Therein it was provided, by Section 4(b), that "the amount paid or accrued in violation of the act or regulations . . . which may be disallowed and disregarded shall be the entire amount of the wage . . . and not merely the amount paid or accrued in excess of the legal maximum" and that where there were "extenuating and mitigating circumstances" of the type listed, "the usual and general policy shall be to disallow an amount at least equal to that portion of any payment or accrual in excess of whatever payment was permissible under the governing regulation . . . ." Section (4a) provided that such disallowances may be made for the purposes of calculating deductions under the income tax, costs and

expenses under Government contracts, maximum prices under the Act, and/or costs or expenses under any other law. By the above provisions of this General Order the Executive exhausted all his authority under the second sentence of Section 405(b).

We cannot find in that sentence any language possible of an interpretation further empowering the President to adjudicate whether each alleged violator had in fact contravened the Act. The language, "the President shall *prescribe* the extent to which" illegal wage payments shall be disregarded does not grant him adjudicatory, as distinguished from regulatory, power. The word, "prescribe" means (*2 Webster's New International Dictionary* 1954 (2d ed., unab., 1947)):

> "To lay down authoritatively as a guide, direction, or rule of action; to impose as a peremptory order; to dictate; direct; ordain; as to *prescribe* regular hours of study."

This definition has received wide judicial acceptance. See, *e.g., Scrier v. Riley*, 198 Cal. 170, 175, 244 Pac. 323 (1926); *Smith-Brooks Co. v. Young*, 103 Colo. 199, 203, 85 P.2d 39 (1938); *Alsop v. Pierce*, 155 Fla. 184, 190, 19 So.2d 799, 803 (1944); *Koenig v. Flynn*, 258 N.Y. 292, 300-01, 179 N.E. 705, 707 (1932); *Commonwealth v. Old Dominion Power Co.*, 184 Va. 6, 15, 34 S.E.2d 364, 368 (1945); *State v. Seattle Nat'l Bank*, 130 Wash. 69, 226 Pac. 259 (1924).

Thus, "prescribe" can only be construed as authorizing the President to publish "a guide, direction, or rule of action" such as he did by General Order 15. Neither the word "prescribe" or any other language in the sentence under consideration can be stretched to include a meaning

BLEED THROUGH

BLURRED COPY

of trial and decision or hearing, findings and penalty. If Congress, in lieu of the word "prescribe" had used such terminology as "adjudicate," "find," or, perhaps, even "determine" or "decide" a plausible (though not convincing) argument could be made that the grant of authority included the power to hear and decide the issue of individual violations. But the terminology actually used can only mean the issuance of a general principle to control in the adjudicatory process.

The Appellants argue (Aplts. Br. p. 42) that "it is clear from the provision in question that the disallowance in individual cases were initially to be *determined* 'by the executive departments and other governmental agencies'" (emphasis added). We cannot follow this reasoning, which is based upon an obviously incorrect paraphrasing of Section 405(b)'s language. The Section does not so provide, or contain any language susceptible of such a construction. It does not contain the concept of determination at all. Nor does it grant any power or authority to "the executive departments and other governmental agencies." Expressly, literally, and by any reasonable intendment it merely permits the President to issue a general rule as to the extent wages paid in violation shall be taken into account for penalty purposes, as found by the appropriate tribunal, and thereafter disregarded by "the executive departments and other governmental agencies."

The difficulties with Appellants' construction of Section 405(b) lie not only in what the Section says, but in what it omits. Despite the widespread use of the administrative process in modern times, we submit that the grant of authority to an administrative agency to hear and de-

cide individual cases and to impose penalties may not be inferred.[3] In view of the many statutes in which Congress has explicitly provided for administrative adjudicatory powers, it is inconceivable that Congress would here have intended a grant of such power without having so provided in unmistakable language. Despite the need for the administrative hearing and determination in many situations, the process is frequently looked on with disfavor because of the deprivation of the right to a jury trial, the loss of protection from the usual rules of evidence, the lack of formalized procedures, the frequent placing of the burden of proof on the alleged violator,[4] the frequent use of temporarily appointed hearing officers, and the other departures from traditional judicial concepts. So far as violations of wage stabilization regulations are concerned, as contrasted with a maximum fine of $10,000 (and/or one year's imprisonment) for a willful violation (*cf. United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 73 S.Ct. 227 (1952)), the disallow-

---

[3]An agency's powers are, of course, limited to those granted by statute. *Neuberger v. Commissioner*, 311 U.S. 83, 89, 61 S.Ct. 97, 101 (1940); *FTC v. Raladam Co.*, 283 U.S. 643, 649, 51 S.Ct. 587 (1931); *Waite v. Macy*, 246 U.S. 606, 38 S.Ct. 395 (1918).

[4]Compare Wage Stabilization Press Release WSB-273 of September 11, 1952, Interpretation Bulletin No. 22 of October 1, 1952, par. 5B4-5 (7 LRR-WHM 100:412i). General Wage Regulation 5 of February 12, 1951 (16 Fed. Reg. 1507), authorized employers to grant wage increases, within certain limits, as a reward for merit or length of service. Yet by the Press Release, the Wage Stabilization Board a year and a half later, with reference to General Wage Regulation 5, stated:

> "All increases are presumed to be general unless the employer asserts and shows that the increases were permissible on another basis such as individual increases for merit or length-of-service."

BLEED THROUGH

BLURRED COPY

ance penalty could, as possibly in the instant case, run into several million dollars. Yet the Appellants would have us believe that Congress intended to grant the Executive, as distinguished from the judiciary, the power to decide individual cases and impose such a penalty, without affording the alleged violator even the minimum protection of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. §§ 1001 *et seq.* (1946)).[5] Even if it were permissible to construe the language of Section 405(b) as possibly authorizing an administrative adjudication of violations, it would be almost inconceivable to conclude Congress intended such an authorization in view of its failure to specify any standards, guides, or limitations to the administrative process. The clear language of the Section, however, only authorized the Executive to promulgate rules establishing penalties, as he did by General Order 15. It does not grant the Executive adjudicatory powers.

2. *By Section 706(b) Congress granted jurisdiction to the federal courts to determine all violations.* The conclusion that Congress did not intend by Section 405(b) to grant to the Executive power to hear and determine individual violations is fortified by the express grant of jurisdiction to the federal courts and the Attorney General. In this connection, Section 706(b) of the Defense

---

[5]Under Section 709 of the Defense Production Act of 1950 (64 Stat. 819, 50 U.S.C. App. § 2159 (Supp. V)), "The functions exercised under this Act shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of Section 3 thereof." This provision rendered the Administrative Procedure Act inapplicable to the administrative hearings expressly provided for in the Act, such as the hearing under Section 602(b) (64 Stat. 813, 50 U.S.C. App. § 2132(b) (Supp. V 1952)) pertaining to violations of credit limitations and specifying "notice and opportunity for hearing."

Production Act of 1950 (64 Stat. 817, 50 U.S.C. App. § 2156(b) (Supp. V 1952)) provides:

> "The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall has jurisdiction of violations of this Act or any rule, regulation, order or subpena thereunder, and of all civil actions under this Act to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, order, or subpena thereunder. . . . All litigation arising under this Act or the regulations promulgated thereunder shall be under the supervision and control of the Attorney General."

Thus, the jurisdiction of "violations" of the Act and regulations or of actions to "enforce any liability" created by the Act or regulations (Section 405(b) and General Order 15) is expressly placed in the U.S. district courts in actions to be brought by the Attorney General. Here there is no necessity of assuming power or authority, as Appellants do in connection with Section 405(b). Section 706(b) is express and explicit and grants such power, without ambiguity, uncertainty, or equivocation, to the federal courts and the Attorney General.

Comparing the two sections, Judge Sloan of the United States District Court for the Northern District of Georgia, Atlanta Division, in the case of *Belcher Oil Co. v. National Enforcement Comm'n,* 114 F. Supp. 377, 381-82 (1953), observed:

> "It seems that under the guise of authority granted to the President to 'prescribe the extent to which' wage payments made in violation of a regulation or order shall be disregarded by the Executive Depart-

BLEED THROUGH

BLURRED COPY

ment, that the agency has undertaken to assume the authority to administratively determine violations of the Act, to fix the extent of such violations, to determine that the entire amount of the anual wage should be disallowed, unless extenuating or mitigating circumstances exist, and in such case to fix a lesser amount not less than the excess payment, and to make such administrative determination final, conclusive and binding upon other departments and agencies. This is true notwithstanding the express provision of Section 706(b) of the Act, 50 U.S.C.A. Appendix § 2156(b) which provides:

* * * * * * * *

"This Court is presently of the opinion that the Act did not authorize the President to determine whether such wage adjustments were made in violation of the Act or the regulations promulgated thereunder, but confined the power of the President to prescribe the extent to which compensation payments in contravention of the regulation should be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of the employer for the purposes of any other law or regulation.

"Consequently, the delegation of this authority by the President to the head of the agency, the Economic Stabilization Administrator, did not confer upon that official powers that the President did not have.

"The National Enforcement Commission had no power or authority to determine administratively that a violation had occurred, or the extent of such violation."

The specific attention which Congress paid to the interrelationship of Section 706(b) and Title IV is highlighted by the provision in the Section that "All litiga-

tion arising under this Act or the regulations promulgated thereunder shall be under the supervision and control of the Attorney General." In commenting on this Section the Conference Committee, having noted the provision with respect to administration of wage and price controls through a new independent agency, said:

> "The House bill provided that any attorneys appointed for these agencies could appear for and represent the agency in any case in any court. Such authority was omitted from the conference substitute in view of the fact that under the provisions of Section 706 as adopted by the Committee of Conference all litigation arising under the Act or the regulations promulgated thereunder was placed under the supervision and control of the Attorney General." H.R. Rep. No. 3042, 81st Cong., 2d Sess. 37 (1950).

3. *Sections 405(a) and 409, as amended in 1951, make it clear that Congress did not intend to authorize administrative determinations of violations under Section 405(b).* Section 405(a) (Aplts. Br. Apdx. p. 80) originally made unlawful the purchase or sale of materials in violation of the price control provisions of the Act, and the 1951 amendment (65 Stat. 136, 50 U.S.C. App. § 2105(a) (Supp. V 1952)) added a provision that the "President shall also prescribe the extent to which any payment made . . . in violation . . . shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any such person for the purposes of any other law or regulation. . . ." At the same time (65 Stat. 136, 50 U.S.C. App. § 2109(d) (Supp. V 1952)) subparagraph (d) was added to Section 409 to provide that the "President shall also prescribe the extent to which"

BLEED THROUGH

BLURRED COPY

any fine for violation of wage or price regulations or any payment in compromise or satisfaction of a price suit "shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any such person for the purposes of any other law or regulation." As we shall see, it is clear that Congress did not in these two provisions authorize administrative determination. A similar conclusion is therefore required as to Section 405(b) which uses the identical language—"The President shall also prescribe the extent to which . . . shall be disregarded by the executive departments."

Section 409(d) deals with disallowance of fines paid for violation of price or stabilization regulations and of amounts paid in satisfaction of over-ceiling price suits. Obviously, in authorizing the President to prescribe the extent to which such payments shall be disregarded by the executive department, Congress did not envision any hearings and findings but only a general, controlling regulation. If, for example, an employer had been found guilty in federal court of violating stabilization regulations and fined $5,000.00, no other hearing and determination would be necessary or conceivable. All that would be needed would be a general order prescribing the extent to which such payments should be disregarded by the executive departments for tax and other purposes. The same would be true where a seller paid a sum of money in satisfaction of a judgment for an over-ceiling sale. Now, if the language in Section 409(d) does not authorize any administrative hearing and finding to determine the extent to which the payment shall be disregarded by the executive departments, how can Congress's prior use

of the identical language in Section 405(b) be held to empower such hearing instead merely of authorizing issuance of a general directive governing all such cases?

It is also clear that Congress, in amending Section 405(a) to provide for disallowance of illegal price payments, did not intend to authorize administrative determination of violations. In connection with price controls Congress provided in the Defense Production Act of 1950 for an elaborate procedure for challenging price regulations and review thereof by the Emergency Court of Appeals. Under Section 408(d) (64 Stat. 808, 50 U.S.C. App. § 2108(d) (Supp. V 1952)) it was provided that "The Emergency Court of Appeals . . . shall have exclusive jurisdiction to determine the validity of any such regulation or order" and that, "Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation or order." Subsection (e) followed by providing for a challenge of the validity of a price regulation before the Emergency Court, if the challenge was made within a specified time after arraignment or judgment "in any civil or criminal proceeding, brought pursuant to sections 409 or 706 of this Act. . . ."[6]

If Section 405(a) were interpreted to authorize violations to be administratively determined, there would be no opportunity to challenge price regulations in disallow-

---

[6]Under the 1952 amendment of Section 408, subsection (b) was stricken so that subsections (d) and (e) became subsections (c) and (d) respectively, 66 Stat. 302.

BLEED THROUGH

BLURRED COPY

ance proceedings.[7] The anomally would result that a person sued for a 10-cent ceiling price violation might challenge the validity of the regulation allegedly violated, while one against whom an administrative board asserted a disallowance penalty of thousands of dollars would have no opportunity to challenge the regulation's validity in any court! Of course, such a discriminatory construction of the statute is avoided by recognizing that Congress intended that determinations of price violations under Section 405(a) should be made by the federal courts pursuant to the grant of jurisdiction in Section 706. The amendment of Section 405(a) thus confirms the district court's construction in the instant case of Section 405(b).

Appellants, anticipating the above analysis of the meaning of Sections 405(a) and 409(d), have attempted to furnish support for their construction of 405(b) with the argument that "Congress added administrative disallowance as an enforcement method in connection with violation of price regulations, specifically recognizing that, prior to that amendment, administrative enforcement had been available only in connection with wage stabilization regulations" (Aplts. Br. p. 19). It is certainly true that Congress did add additional sanctions

---

[7]Even if we assume, for purposes of argument, that the defendant could obtain a review of the administrative determination through a suit in the Tax Court or a suit for a tax refund in a district court or the Court of Claims, he nevertheless could not obtain judicial review of the validity of the price regulation. This is true since under Section 408(e) it is only in proceedings brought under Sections 409 or 706 of the Defense Production Act of 1950 (as distinguished from the Internal Revenue Code or any other law) that a reference may be made to the Emergency Court of Appeals. Nor could the Tax Court, district court, or Court of Claims in a tax suit have any power to rule since Section 408(d) vests exclusive jurisdiction in the Emergency Court of Appeals.

for price and wage violations, but there is nothing in these two provisions indicating that Congress intended thereby that the Executive should administratively determine whether a particular individual had violated the law. Appellant's assumption that they authorize an administrative hearing and determination of violation is no more valid than the similar unwarranted assumption that Section 405(b) empowers such a proceeding. When they were enacted in 1951, Congress was not even aware that the Executive purported to have authority to determine administratively whether an individual had contravened the Act and to impose penalties. In detailing the legislative history of these two provisions (Aplts. Br. pp. 62-64), the Appellants' quotations from the record, as distinguished from their broad, unwarranted generalizations, do not disclose any representations to Congress that the Executive intended under Section 405(b), or any other provision of the Act, to administratively determine violations and impose penalties. On the contrary, the Appellants' account of the legislative developments discloses that the earliest report to Congress which might be construed as even suggesting that the Executive was assuming such power was in October, 1951 (Aplts' Br. p. 51). The 1951 amendments containing these two provisions were reported to the Senate on June 21, 1951 (Sen. Rep. 470, 82d Cong., 1st Sess.) and to the House on June 23, 1951 (H. R. Rep. 639, 82d Cong., 1st Sess. 28-29), and were subsequently enacted without change in form. Furthermore, at no time was Congress advised that the Executive claimed that the source of such asserted power was in Section 405(b) itself. In fact, it was not until the Appellants filed their trial brief in this very case on July 24,

BLEED THROUGH

BLURRED COPY

1953 that, so far as we can ascertain, the Government ever alleged such power could be found in Section 405(b).

4. *Section 705(a) does not authorize the Executive to hold violators guilty and impose penalties.* For the first time in their brief filed herein, the Appellants argue (Aplts. Br. p. 76) with reference to Section 705 of the Defense Production Act of 1950 (64 Stat. 816, as amended, 65 Stat. 139, 50 U.S.C. App. § 2155(a) (Supp. V 1952)) that "there can be little doubt that this provision itself fully authorizes the President or his agent to conduct the administrative hearings involved in this case"! No such claim was even asserted in the Statement as to Jurisdiction filed by the Appellants herein. Nor does this argument have any validity whatsoever. On the contrary, it demonstrates the Government's desperation in seeking to find some language in the Act which it can assert gives some color of legality to its administrative proceedings herein involved.

Section 705(a), which of course, is applicable to the controls authorized by various titles of the Act, and not just to Title IV, provides in part:

> "The President shall be entitled, while this Act is in effect and for a period of two years thereafter, by regulation, subpena, or otherwise, to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, and take the sworn testimony of and administer oaths and affirmations to, any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act and the regulations or orders issued thereunder. The President shall issue regulations insuring that the

> authority of this subsection will be utilized only after the scope and purpose of the investigation, inspection, or inquiry to be made have been defined by competent authority, and it is assured that no adequate and authoritative data are available from any Federal or other responsible agency."

The above provisions do not in any manner authorize, or even contemplate the Executive holding hearings against accused violators to determine guilt and impose penalties. Actually as properly characterized by Appellants (Aplts. Br. p. 76), the Section grants "investigatory powers." As summarized by the Senate Committee reporting on the Defense Production Bill of 1950:

> "Section 705 contains authority to require reports, collect information, and make investigations." Sen. Rep. 2250, 81st Cong., 2d Sess. 11.

That the Executive's authority under the Section is limited to investigatory, as contrasted with adjudicatory powers, is demonstrated by the following language therein:

> (a) The first sentence can only be read as authorizing the President "to obtain such information" as he needs. "Information" is the key to the entire Section.
>
> (b) He can only seek the information after "the purpose of the investigation, inspection, or inquiry" has been defined. This is hardly language of authority to conduct an adjudicatory hearing, determine guilt, and impose a penalty.
>
> (c) Finally, and conclusively, his powers under this Section can only be utilized if "no adequate and authoritative data are available from any Federal or

BLEED THROUGH

BLURRED COPY

other responsible agency." Thus, if the "data," the information, is available from some other source, the President is not to bother the citizen. This limitation makes clear that this Section pertains only to the gathering of information. Actually, the provisions of this Section add weight to Appellee's arguments. Had Congress intended to grant the Executive power under Section 405(b) to try and judge alleged violators, Section 705(a) would have contained some language with reference to the use of such powers, or rules to govern the conduct of such hearings.

In summary, as the statutory three-judge trial court concluded herein [R. 36]:

> "It is sufficient to say that we are unable to perceive in the Defense Production Act any authority for the imposition of penalties by the National Enforcement Commission. To the contrary, the statute vests jurisdiction in the District Courts of the United States of all actions under the Act to enforce any liability or duty created thereby."

B. The Legislative History of the Act Does Not Support the Executive's Claim to Adjudicatory Power.

In apparent recognition of the fact that neither the language of Section 405(b), nor that of any other provision of the Act, authorizes the President to administratively determine whether an employer has violated the Act, the Appellants devote the bulk of their brief on this issue (pp. 43-57) to an attempt to demonstrate that the legislative history of the Act supports their interpretation. And in so attempting, they rely on testi-

mony before subcommittees, appropriation acts, committee reports under a number of different acts extending over a 12 year period, amendments, rejected amendments, and other material. The simple gist of Appellants' argument in this connection is that Congress approves every bit of administrative action of which it theoretically has any knowledge if it fails by specific enactment to repudiate such practice or appropriates any money for the agency. The decisions of this Court do not support such a claim.

Before discussing the legislative history relied upon by Appellants, and which, as we shall see, does not support their position, we will briefly discuss the use of this material. First, and of most importance, is the absence of any legitimate legislative history sustaining the Appellants' interpretation of the Act. Neither the House nor Senate committee's (nor the conference) report on the Defense Production Bill of 1950, or of the 1951 or 1952 amendatory bills, is quoted by Appellants with any language showing Congressional awareness, let alone approval, of an administrative adjudication of alleged violations and imposition of the penalty therefor. The same is true as to the discussion on the floor in the consideration of these bills.

Secondly, we submit, the language of the Act so clearly and unambiguously places jurisdiction over violations in the federal courts that, in accordance with the principles of this Court, resort to legislative history is unnecessary and, indeed, improper. *Ex parte Collett*, 337 U.S. 55, 61, 69 S.Ct. 944, 947 (1949); *Wilbur v. United States*, 284 U.S. 231, 237, 52 S.Ct. 113, 115 (1931); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77,

BLEED THROUGH

BLURRED COPY

83-84, 53 S.Ct. 42, 44 (1932); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-397, 71 S.Ct. 745, 751-752 (1951).

Thirdly, we are not here concerned with long-settled and consistent administrative or judicial interpretation of a statute followed by re-enactment such as was involved in *Helvering v. Winmill*, 305 U.S. 79, 83, 59 S.Ct. 45, 46 (1938); *Commissioner v. Flowers*, 326 U.S. 465, 469, 66 S.Ct. 250, 252 (1945); *Shapiro v. United States*, 335 U.S. 1, 16, 68 S.Ct. 1375, 1383 (1948), and other similar cases relied upon by Appellants (Aplts. Br. pp. 48-49). As we shall see, there has been no judicial interpretation. And we do not have a situation here such as is involved in the Treasury and similar cases where the administrative agency, in pursuance of its duty of issuing regulations interpreting the statute, adopts a not unreasonable construction. Here the question is whether or not the agency has any power at all to act. The administrative action here involved is not the interpretation of a specific provision of the Act but merely the naked arrogation of power which has no support whatsoever in any of the language of the Act.

Finally, in connection with the Appellants' appropriation act argument (Aplts. Br. pp. 52-57), we do not have a situation where the appropriation act itself, as in the case of *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 67 S.Ct. 1129 (1947) and the other cases cited by Appellants (Aplts. Br. p. 57), expressly approved the disputed authority. As this Court observed in *Ex parte Endo*, 323 U.S. 283, 303 (n.24), 65 S.Ct. 208, 219 (1944), "the appropriation must plainly show a purpose to bestow the precise authority which is claimed."

The Appellants do not even claim, as they conscientiously could not, that the Supplemental Appropriations Act of 1954 (67 Stat. 418) or any other appropriations act expressly recognized the authority or existence of the National Enforcement Commission or of the President or any of his agencies to determine an accused has violated wage stabilization and impose a penalty.

1. *Similarity of Section 405(b) with the Stabilization Act of 1942 does not indicate Congressional approval of administrative adjudication of violations.* It is true, as Appellants point out (Aplts. Br. pp. 43-44), that Section 405(b) of the Defense Production Act of 1950 is substantially identical with Section 5(a) of the Stabilization Act of 1942 (56 Stat. 767, 50 U.S.C. App. § 965(a) (1946)), but it does not follow from this circumstance that Congress intended thereby to authorize the administrative determination of violations, such as was practiced under the 1942 stabilization act.

Preliminarily it should be observed that the practice under the Stabilization Act of 1942 of the tri-partite War Labor Board determining violations of the Act and regulations was itself of doubtful validity. Thus, in this connection, the former Executive Director of the War Labor Board concluded:

> "The very broad and practically undefined authority granted by the Stabilization Act to the President, not only to set up the Stabilization rules but also to prescribe the penalties for violation, represented a departure from normal legislative practice. The further delegation of wide enforcement powers to the Board, as provided in the regulations of the Economic Stabilization Director, raised a specter of unconstitutionality which haunted some members of

BLEED THROUGH

BLURRED COPY

the Board's legal staff throughout the period in which the Stabilization Act was in force. (Footnote 7): The constitutionality of the Board's enforcement powers could conceivably have been challenged on several grounds. It might have been contended either that the statutory delegation of authority to the President was too broad, or that the rules and regulations implementing the statute were improper and illegal. . . ." *Problems & Policies of Dispute Settlement & Wage Stabilization During World War II,* Bull. No. 1009, U.S. Dept. of Labor (1950) 354.[8]

---

[8]The usurpation of powers, not authorized by the statute, was recognized by a congressional committee in connection with the grant by the President to the War Labor Board of labor dispute settling responsibilities. A House committee concluded, on January 26, 1944, in this connection:

"It is important to note that no statutory authority existed for the creation of the National War Labor Board. It is the opinion of your committee that the War Labor Board had no legal authority to issue orders or directives binding upon anyone until the passage of the War Labor Disputes Act (P.L. 89, 78th Cong., 1st sess.) and only then in accordance with the provisions of the Act.

* * * * * * *

"As has heretofore been pointed out, no statutory authority existed for the appointment of the National War Labor Board until the enactment of the War Labor Disputes Act on June 25, 1943. Prior to that time the Board's orders and directives were in violation of Article I, section 1, of the Constitution of the United States, which provides: All legislative [*i.e.,* law-making] powers herein granted shall be vested in the Congress of the United States which shall consist of a Senate and House of Representatives." *Fourth Intermediate Report of the Select Committee to Investigate Executive Agencies, pursuant to H. Res. 102,* 78th Cong., 2d Sess., pp. 6, 11.

Similarly, in more recent years, the President, purporting to act under the Defense Production Act of 1950, attempted to grant the same powers to the Wage Stabilization Board (Executive Order No. 10161, September 9, 1950, 15 Fed. Reg. 6105), though the agency representatives later acknowledged that there was no statutory authority for such alleged grant of power. 97 *Cong. Rec.* 7692.

And contrary to the implications in Appellants' Brief (p. 49, n.28) the validity of the administrative determination of violations by the War Labor Board under the World War II legislation was never judicially determined. The case of *Troy Laundry Co. v. Wirtz*, 155 F.2d 53, 55 (9th Cir.), *cert. denied*, 329 U.S. 723, 67 S.Ct. 66 (1946) involved only the subpena power of the War Labor Board. And, in this connection, the War Labor Disputes Act of June 25, 1943 (57 Stat. 163, 50 U.S.C. App. §§ 1501 *et seq.* (1946)) gave statutory authority to the War Labor Board and expressly conferred subpena powers. In *N. A. Woodworth Co. v. Kavanagh*, 102 F.Supp. 9 (E.D. Mich. 1952) *aff'd per curiam*, 202 F.2d 154 (6th Cir. 1953), and *Weather-Seal Mfg. Co. v. Commissioner*, 16 T.C. 1312 (1951), *aff'd mem.*, 199 F.2d 376 (6th Cir. 1952), both involving the Stabilization Act of 1942, neither the Sixth Circuit nor the lower courts decided (nor was the question even raised) whether the Act authorized the administrative finding of violations and imposition of penalties. It is not surprising that there was no test of such asserted power under the Stabilization Act of 1942. In view of the tri-partite character of the War Labor Board and its panels, the industry and labor members (who had the majority voting power) would not permit a heavy penalty. *Problems & Policies of Dispute Settlement & Wage Stabilization During World War II*, Bull. No. 1009, U.S. Dept of Labor (1950) 243, 362, 365; *I Termination Report of the National War Labor Board* (1946) 430-431. As indicated by the figures submitted by Appellant (Aplts. Br. p. 49), the average disallowance was only $300.00. Under such circumstances employers could hardly afford to test

BLEED THROUGH

BLURRED COPY

in the courts the legality of the War Labor Board penalty proceedings.

But however interesting it may be to speculate as to the legality of the proceedings under the Stabilization Act of 1942 and the President's constitutional powers during a war for survival, that experience actually has no relevance to the instant issue. In the first place, it is not clear that Section 5(a) of the Stabilization Act of 1942 was alleged to be the source of asserted power to administratively determine violations and impose penalties. The regulations of that period and the quotations from congressional reports, set forth by Appellants, do not cite such a source. Secondly, and of paramount importance, the Stabilization Act of 1942 contained no provision vesting jurisdiction over violations in the federal courts, such as is found in Section 706(b) of the Defense Production Act of 1950 (*supra*, p. 26). Here we have a basic difference in the two statutes which renders completely invalid any claim that Congress intended by the later statute to authorize administrative determination of violations. As a matter of fact, the only conclusion to be drawn with reference to the Stabilization Act of 1942 in connection with this problem is that Congress demonstrated an intent to repudiate any possible assertion of administrative authority to impose penalties by specifically granting jurisdiction to determine violations of Section 405(b) of the Defense Production Act of 1950 to the United States District Courts.

Recognizing the force of the logic that the provisions of Section 706(b) completely destroy any analogy to the Stabilization Act of 1942, the Appellants have desperately sought to explain away the significance of that

provision (Aplts. Br. pp. 60-61). Their efforts to do so by comparison with certain sections of the Emergency Price Control Act of 1942 (56 Stat. 23, 33, 50 U.S.C. App. §§ 901 *et. seq.* (1946)) is clearly unconvincing. In the first place, the scope of Section 706(b) of the Defense Production Act of 1950 (*supra*, p. 26; Aplts. Br. Apdx., pp. 84-85) is not "substantially the same" (Aplts. Br. p. 61) as Section 205(c) of the Emergency Price Control Act of 1942 (Aplts. Br. Apdx. pp. 78-79). It is very much broader, as a comparison of the language readily shows. But most important, the provisions of the Emergency Price Control Act of 1942 have no bearing on this problem. It was the Stabilization Act of October 2, 1942 (56 Stat. 765, 50 U.S.C. App. §§ 901 *et seq.* (1946)) which authorized the President to stabilize wages during World War II. It was Section 5(a) of that Act (not the Emergency Price Control Act of January 30, 1942) which was similar to Section 405(b) of the Defense Production Act of 1950 (Aplts. Br. p. 44). And the Stabilization Act of 1942 contained no provision, such as Section 706(b) of the Defense Production Act of 1950, giving the federal courts jurisdiction for any purposes (nor did Section 205(c) of the Emergency Price Control Act of 1942 extend jurisdiction to the federal courts in any respect in connection with wage stabilization violations). Thus, the 1942 wage stabilization legislation made no provision for federal court jurisdiction. By way of contrast, the 1950 wage stabilization legislation specifically granted jurisdiction to the federal courts and the Attorney General over "violations" of the Act and regulations and actions to "enforce any liability" under the Act or regulations. Thus, it is clear that the practice under the 1942 legislation did not receive

BLEED THROUGH

BLURRED COPY

approval, but rather was repudiated by the 1950 legislation.

2. *Legislative events since enactment of Section 405 (b) do not support the asserted adjudicatory power of the Executive.* The Appellants purport to find support for their contention in the legislative developments since the original enactment of Section 405(b) in 1950 (Aplts. Br. pp. 49-64). The events relied on, however, do not justify their conclusion therefrom.

Preliminarily we should point out that the National Enforcement Commission of the Economic Stabilization Agency was established on July 28, 1952 by the Economic Stabilization Administrator's General Order No. 18 (17 Fed. Reg. 6925, Aplts. Br. Apdx. pp. 94-97). Up to June of 1952 (the month of enactment of the 1952 amendments to the Defense production Act of 1950), the prior National Enforcement Commission of the Wage Stabilization Board had issued but two decisions that had been published (on April 21, 1952 by the Bureau of National Affairs, in its Labor Relations Reporter, Vol. 7, pp. 100:1151-64; compare Appellants Brief, p. 53, n.32).

It is true, as Appellants point out (Aplts. Br. p. 50), that in 1951 Congress added the additional sanction of disallowance by the executive department (upon judicial determination of violation) to price violators and provided for the disallowance (principally for income tax purposes) of fines, etc. paid for violations of wage and salary stabilization. However, as we have shown above (pp. 28-32), these provisions do not support Appellants' interpretations.

The quotation from the Conference Report on the 1952 Amendment to the Defense Production Act of 1950

(Aplts. Br. p. 52), will not, we are sure, mislead the Court as it apparently has the Appellants. Of course, the Wage Stabilization Board, under the Economic Stabilization Agency, had enforcement duties under the Act and regulations. Thus, it made investigations to uncover violations; it informally induced violators to cease their contravention; it carried on a public information campaign to encourage compliance, and so on. But such enforcement functions are far different in character than the authority to try alleged offenders and impose penalties for violations. The Administrator of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. §§ 201 *et seq.* (1946)) is charged with the duty of enforcing that Act. He makes investigations, obtains compliance when violators are uncovered, and so on. But he has no power and authority to hold hearings on charges against alleged violators or impose penalties for violations. He must bring such a proceeding in the federal courts. The same is true of scores of federal statutes. Enforcement functions by the administrative agency do not include the power to judge and impose penalties for violations. The same is true under the Defense Production Act of 1950 relative to wage stabilization violations, and the Conference Report referred to does not contain anything even indicating the contrary.

It is also true that a handful of members of a House Subcommittee and the Senate Appropriations Committee learned in 1953 that the National Enforcement Commission of the Economic Stabilization Agency was holding hearings to determine violations (Aplts. Br. pp. 52-57). However, the resulting action of these commitees and of Congress was a repudiation of the Agency's practice in

BLEED THROUGH

BLURRED COPY

holding such hearings. The Senate Appropriations Committee considering the Supplemental Appropriations Bill, 1954, clearly recognized (at a time when the existence of the agency was, under Section 717(b)(3), to continue to October 31, 1953) that jurisdiction to proceed with wage and salary stabilization cases involving alleged violations rested solely with the Department of Justice under Section 706(b) of the Defense Production Act of 1950 when it refused to appropriate funds for the liquidation of the Economic Stabilization Agency and stated:

> "It is the sense of the committee that pending cases should be turned over to the Department of Justice for review so that the agency will not be continued by a continuation of these suit." (Sen. Rep. No. 677, 83d Cong., 1st Sess. 17 (1953)).[9]

Further, contrary to Appellants' assertion (Aplts. Br. p. 57) that the funds restored by conference were "concededly to be used in part for the winding up of pending wage enforcement proceedings," the final action

---

[9]The Senate Committee report was issued just four days after the Committee had heard the statements of Holland which are relied on so heavily by Appellants! (Aplts. Br. pp. 54-56). Of course, in full context, these statements of Holland could not be understood even as dealing with, much less as "conceding," the validity of administrative trial of alleged violators. His point was that in continuing to carry on its business as usual, the Agency was not "liquidating" in accordance with the mandate in Sections 717(a) and 717(b)(3) of the Act (Aplts. Br. Apdx. pp. 86-87) and was discriminating among the employers who had allegedly committed some violation and particularly those who had dared to challenge in court the authority of the Agency. Both he and Fleming pointed out the pendency of a number of cases challeging the validity of the administrative action, including the instant case which went to trial on the following day, July 24, 1953. And the members of the Senate Committee on Appropriations clearly recognized that the issues presented were for the courts to decide. *Hearings before Senate Committee on Appropriations on Supplmental Appropriation Bill, H. R. 6200,* 83d Cong., 1st Sess., 424-34 (1953).

on the appropriation, we submit, repudiated the agency's assertion of authority to hold wage stabilization violation penalty hearings. Bearing in mind that the chief function of the Economic Stabilization Agency at the time was in connection with rent control and that as of July, 1953 there were 146 cases of alleged wage stabilization violations pending in various stages before the National Enforcement Commission,[10] the appropriation finally voted did not include any sums for continuing such hearings but clearly contemplated the prompt liquidation of the Agency. In this connection, as pointed out by Senator Bridges, the Chairman of the Senate Appropriations Committee, in order to pay terminal leave and close the Economic Stabilization Agency as of July 31, 1953, the agency needed $1,144,770. An appropriation of an additional $355,730 (a total of $1,500,000) would have permitted a skeleton staff only to continue until the formal expiration date, October 31, 1953.[11] However, Congress finally on August 3, 1953 appropriated only $45,230 (a total of $1,200,000) over the amount required to cease all activity as of July 31, 1953 (67 Stat. 433). This was

---

[10] *Id.* at 430.

[11] Mr. Bridges. Mr. President, I point out that this is salaries and expenses for the Economic Stabilization Agency carried in this bill. I should like to have the Senate understand the situation, so there will be no misunderstanding as to what we are doing.

The Senate committee provided $900,000. I have talked with Mr. Fleming of the General Services Administration, with General Persons, and with others regarding this particular item. Yesterday they showed me the figures as to what would be required if this agency were to close tomorrow, July 31. In order to pay terminal leave and close on July 31, $1,144,770 would be required.

I think we are fooling ourselves if we do not handle this problem in a realistic manner. We must provide enough money so that the agency can be liquidated. Certain parts of it can be con-

BLEED THROUGH

BLURRED COPY

barely enough to permit the immediate closing of all offices, and certainly did not include funds for continuing administrative hearings. The only possible conclusion to be drawn from this bit of legislative history is that Congress was impatient with the Economic Stabilization Agency and directed it to cease its functions immediately.

Thus, the "legislative history"—particularly the absence from the 1942 wage stabilization legislation of any provision comparable to Section 706(b) of the Defense Production Act of 1950 and the repudiation of the Economic Stabilization Agency's activity by the Supplemental Appropriations Act of 1954—strongly indicates congressional disapproval of administrative trial of alleged violators. But, in any event, Section 405(b) does not grant such authority. Nor should such authority be implied, particularly in view of the express provisions of Section 706(b) giving the federal courts and the Attorney General jurisdiction over wage stabilization violations. Thus, the attempt of Appellants to hold an administrative hearing to determine whether Appellee has violated the wage stabilization regulations is a usurpation of power not granted by Congress and is illegal and void.

---

tinued in the vitally affected areas, for the duration of the extension provided by law. The Senator from New Hampshire, without having an opportunity to talk with all the members of his committee, is offering this amendment as a result of the new information. I do not wish to assume authority which I do not have.

* * * * * * * *

Mr. Hayden. How much of this money is for terminal leave?

Mr. Bridges. I am told that if the agency were closed as of tomorrow night, and terminal leave were paid, $1,144,770 would be required. I am told that a skeleton staff could be continued until the formal expiration date, assuming that the large group is liquidated now, for the amount which I have suggested in the amendment which I have offered, which is $1,500,000." 99 *Cong. Rec.* (daily ed.) 10712 (July 30, 1953).

In conclusion it should be noted that the interpretation of Sections 405(b) and 706(b) urged by Appellee avoids some of the serious constitutional issues presented under the Appellants' view, as hereinafter discussed.

II.

"All Authority" of the Executive and of Any Administrative Agency Under the Act Expressly Terminated on April 30, 1953, Except "for Purposes of Liquidation," Which Limited Authority Expired on October 31, 1953.

Even if it be concluded that under Section 405(b) of the Defense Production Act of 1950, the Executive was authorized to hold administrative hearings to determine whether or not an accused employer had violated wage stabilization regulations, the judgment of the district court herein must, nevertheless, be affirmed. This is so because any authority the President may have had in this regard ceased under the express provisions of the Act on April 30, 1953, or at the very latest, on October 31, 1953. In this subdivision of our brief we shall assume, for purposes of argument, that Section 405(b) did in fact authorize an administrative adjudication of violations and imposition of penalties for contravention of wage stabilization regulations.

A. Under Section 717 of the Act All Wage Stabilization Authority Expressly Terminated on April 30, 1953, With Complete Liquidation of Any Agency Required by October 31, 1953.

Wage and price stabilization was considered at best, by Congress, as a necessary evil to be endured no longer than necessary. It was intended to be applied sparingly, judiciously, and with extreme care (Sections 401, 402,

BLEED THROUGH

BLURRED COPY

708; 64 Stat. 803, 818, 50 U.S.C. App. §§ 2101, 2102, 2158 (Supp. V 1952)), and to terminate, either by the expiration of a specified time or by prior Presidential or Congressional action at the earliest possible moment. The Congressional concern that the Stabilization authority not be used to oppress the citizen unduly is illustrated by its admonition to the Executive "to avoid burdensome and unnecessary reporting and record keeping" (Section 412, 66 Stat. 304 (1952)).

That Congress sought to relieve the citizen as early as possible from the burdens, headaches, and perils of stabilization is shown by its statement (Section 412) that, "It is hereby declared to be the policy of Congress that . . . the general control of wages and prices shall be terminated as rapidly as possible consistent with the policies and purposes set forth in this Act." By the Defense Production Act Amendments of 1952, 66 Stat. 296, approved June 30, 1952, Congress extended the various provisions of the Act. While certain titles of the Act were thereby extended in effect to June 30, 1953, Congress provided that Title IV, entitled "Price and Wage Stabilization" (and including Section 405(b)), and the related Title V, entitled "Settlement of Labor Disputes," should terminate on April 30, 1953, two months earlier! In 1953, Title VII (except Section 714) and certain other provisions (not including Titles IV or V) were extended to June 30, 1955 (67 Stat. 129, 131).

Thus, Section 717 (50 U.S.C. App. § 2166 (Supp. 1953)) of the Act presently provides relative to termination as follows:

> "(a) Title I (except section 104), title III, and title VII (except section 714) of this Act, and all

authority conferred thereunder, shall terminate at the close of June 30, 1955. Section 714 of this Act, and all authority conferred thereunder, shall terminate at the close of July 31, 1953. Section 104, title II, and title VI of this Act, and all authority conferred thereunder, shall terminate at the close of June 30, 1953. Titles IV and V of this Act, and all authority conferred thereunder, shall terminate at the close of April 30, 1953.

"(b) Notwithstanding the foregoing—

* * * * * * * *

(3) Any agency created under this Act may be continued in existence for purposes of liquidation for not to exceed six months after the termination of the provision authorizing the creation of such agency."

Under the express provisions of the Act, then, Title IV (including Section 405(b)) "and all authority conferred thereunder" terminated as of April 30, 1953. Consequently any "authority conferred" by Section 405(b) to hold administrative hearings to determine violations of wage stabilization regulations and impose penalties therefor ceased as of April 30, 1953. Although the holding of such hearings would not appear to be a proper "liquidation" function, in any event, the administrative agency itself had to cease functioning, under Section 717(b)(3), not later than October 31, 1953.

This is the clear and express mandate of Congress in accordance with its will to rid the citizenry of the restraints, hardships, and inequities that inevitably result under such a control program. Appellants resist the inevitable consequences of this clear Congressional language because of their aversion to Appellee's receiving what they characterize (Aplts. Br. pp. 67, 70) as a "legislative"

BLEED THROUGH

BLURRED COPY

or an "automatic pardon." And they open their discussion with the repeated theme that Appellee and other employers for the first time sought injunctions "as this termination date approached" (Aplts. Br. pp. 64, 20).

Now the timing of the instant injunction proceeding (and undoubtedly those involving other employers) was determined by the Agency. Although Appellee was inspected by the Agency as to possible violations in August of 1951 [R. 76], no complaint was issued against it until November 4, 1952! [R. 3, 10, 37]. Following the appointment on January 14, 1953 of Appellant Neal as Enforcement Commissioner to hear the allegations of the complaint, Appellee on January 28, 1953 filed with him a motion to dismiss the complaint upon grounds substantially identical to those raised before the district court [R. 4, 37]. That motion was denied by the Appellant Neal on February 11, 1953 [R. 4, 37], and Appellee then began the present injunction proceeding two days later on February 13, 1953 [R. 1]. Appellee was the first employer to file such an injunction suit. If the Appellants find that delay has somehow worked to their disfavor, they have only themselves to take to task for it.

Undoubtedly the other employers who sought injunctions as soon as they were faced with administrative complaints were influenced to do so, as was Appellee, not by reason of the approaching termination date of the Act, but because of the harsh, shocking and unreasonable decisions being issued by the National Enforcement Commission and because of its usurpation of power and authority in contravention of the intent of Congress. From beginning to end, the stabilization agency indicated a disposition to ignore reason and law. At the outset of the stabilization program, when the labor members of the

Wage Stabilization Board resigned to express their dissatisfaction with the program, the labor members were induced to return to the Board by a modification of policies and, without any statutory authority (see *supra*, p. 39, n. 8), by giving the Board labor dispute settlement functions. Executive Order 10233 of April 24, 1951, 16 Fed. Reg. 3503. At the end, the Board collapsed when the Chairman and the industry members resigned because the President had approved a wage increase for the coal miners which the Board and the Administrator had found to be unapprovable under existing policies (1952 BNA Wage-Hour Rep. 1609, 1619, 1624). The President then purported to create an all public member Wage Stabilization "Committee," contrary to the express provisions of Section 403(b) specifying a tri-partite Board. General Order 19 of Economic Stabilization Agency, issued December 15, 1952, 17 Fed. Reg. 11368. Is it any wonder that employers accused of stabilization violations sought to have their cases heard by the judiciary under the express provisions of Section 706(b) of the Act?

The gist of Appellants' entire argument, particularly as they discuss the alleged powers of the President to transfer the functions of the agency and the General Savings Statute, is that unless somehow they have the authority to proceed, Appellee and some other employers would go unpunished for violation of stabilization regulations.[12] Even assuming that Appellee and these other

---

[12]One obvious answer to the Appellants' complete argument on this issue is that if it is held, as Appellee contended in our first point, that jurisdiction to enforce Section 405(b) rests in the federal courts under Section 706(b), then Appellee can still be proceeded against by the Attorney General in view of the savings clause in the latter section saving liability in federal court actions (further discussed at p. 60, *infra*).

BLEED THROUGH

BLURRED COPY

employers did in some way violate Section 405(b), it is the Congressional will that they not be specifically punished therefor. The approach of Congress was that living under stabilization was itself punishment. It wanted the whole thing washed out April 30, 1953.

Of course, under any controls program such as this, there must be a liability cut-off at some date. Whenever that date arrives, there will always be some violators who will escape penalty. Even by the regulation under which Appellants now purport to have authority to proceed (Executive Order No. 10494 of October 16, 1953, 18 Fed. Reg. 6585, discussed *infra,* p. 55), they may only pursue to a "conclusion" those proceedings previously "instituted pursuant to Section 405." Thus, other employers known or suspected of having violated the regulations cannot be proceeded against.

Assuming, as the agency did, that "liquidation" in Section 717(b)(3), quoted above at page 50, included the power to conclude pending administrative enforcement hearings, then the Congressional intent is clear. All violation cases were to be wound up and disposed of within six months after termination of the Act (or longer if controls were terminated, as was the case, in advance of April 30, 1953). In this connection, it should be noted that the principal method (and probably the only one used) of enforcing price controls was the treble damage action under Section 409(b). That Section contains a one year statute of limitations from date of violation. By way of contrast, the administrative enforcement of wage violations under Section 405(b) could continue up until October 31, 1953, a period of almost three years from the date of institution of wage stabilization on

January 26, 1951. In this connection, all but less than two per cent of the alleged violations by Appellee occurred in February and March of 1951 [R. 46-48, 61, 77-78].

Under the Appellants' view, except for the self-imposed limitations by Executive Order No. 10494, they could pursue and proceed against alleged violators of 1951-1953 wage stabilization for an indefinite number of years. It is rather certain that Congress did not intend that such a threat should hang over anyone as a result of a control program which Congress was not enthusiatic to adopt and which it wished to terminate as early as possible. It is far more reasonable to assume that Congress intended that some 20 employers (Aplts. Br. p. 65, note 45) go "unpunished" than that a large number should be in the uncertain position of being proceeded against over an unlimited number of years. *Cf. United States v. Lindsay*, ... U.S. ....., 74 S.Ct. 287 (1954). Further, Appellee, and undoubtedly the other 19 employers, have already suffered a "penalty," in the great expense of this litigation, despite their possible innocence and the fact that the action of the agency is contrary to law, and that they may have given wage increases under pressure from their employees or their union representatives, who are not being proceeded against by the agency. Finally, any willful violator can still be proceeded against under Section 409(b) and the savings clause in Section 706(b) which is applicable to all court proceedings.

BLEED THROUGH

BLURRED COPY

B. No Authority Existed to Transfer Stabilization Functions to the Office of Defense Mobilization.

1. *Executive Order 10494 was not authorized.* Pursuant to the Congressional mandate, the Economic Stabilization Agency and its National Enforcement Commission did cease to function by October 31, 1953. However, by Executive Order No. 10494 of October 16, 1953 (18 Fed. Reg. 6585), the President purported to transfer the functions of that agency to the Office of Defense Mobilization. This order provided:

> "By virtue of the authority vested in me by the Constitution and laws of the United States, including the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 *et seq.*), hereinafter referred to as the Act, and as President of the United States and Commander in Chief of the armed forces of the United States, it is ordered that the functions remaining under Title IV of the Act shall be, and they are hereby, delegated as follows:
>
> "Sec. 1. *Fiscal liquidation.* Such functions as remain in connection with the fiscal liquidation of the Economic Stabilization Agency are hereby transferred to the Secretary of the Treasury.
>
> "Sec. 2. *Administrative proceedings.* The function of conducting administrative proceedings under Title IV of the Act, including the conclusion of those instituted pursuant to section 405 and the taking of necessary action under sections 407 and 408 of the Act, is hereby transferred to the Director of the Office of Defense Mobilization.
>
> "Sec. 3. *Enforcement and investigations.* In addition to the functions now vested in the Attorney General by the Act, he shall have, and they are

hereby transferred to him, the following described functions under Title IV of the Act: (a) completing the processing of enforcement files, (b) concluding investigations where deemed appropriate, and (c) certifying disallowances (section 409(d)).

"Sections 1 and 2 of this order shall become effective November 1, 1953. Section 3 shall become effective immediately."

This attempted transfer of the functions of the Economic Stabilization Agency is without authority in law and is null and void. And there is not, therefore, any administrative agency in existence which has power and authority to hold hearings under Section 405(b) of the Act.

Obviously, the Executive may not transfer such functions without statutory authority. *Cf. Cudahy Packing Co. of Louisiana v. Holland,* 315 U.S. 357, 788, 62 S.Ct. 651 (1942) (Fair Labor Standards Act Administrator could not delegate power to issue subpoenas in the absence of clear statutory language authorizing such delegation); *Fleming v. Mohawk Wrecking & Lumber Co.,* 331 U.S. 111, 67 S.Ct. 1129 (1947). And the theory that the President has some inherent powers "vested . . . by the Constitution" or as "Commander in Chief of the armed forces of the United States" which would sustain such authority was rejected by this Court in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 72 S.Ct. 863 (1952).

2. *Section 703(a) does not permit such transfer.* The Appellants assert (Aplts. Br. pp. 69-70, 76-77) support for this transfer of functions under Section 703(a) of the Act (64 Stat. 816, 50 U.S.C. App. § 2153 (Supp. V.

BLEED THROUGH

BLURRED COPY

1952)), which concededly is still in effect. The Section provides:

> "Except as otherwise specifically provided, the President may delegate any power or authority conferred upon him by this Act to any officer or agency or agencies (and the President is hereby authorized to create such new agencies, other than corporate agencies, as he may deem necessary), and he may authorize such redelegations by that officer or agency as the President may deem appropriate."

There are two conclusive answers to the claim that this Section authorized the transfer.

a. In the first place, delegation is permitted, "except as otherwise specifically provided." The Act does contain such a specific prohibition against delegation of Title IV functions. Section 403 (64 Stat. 807, 50 U.S.C. App. § 2103 (Supp. V 1952)) provides:

> "At such time as the President determines that it is necessary to impose price and wage controls generally over a substantial portion of the national economy, he shall administer such controls, and rationing . . . through a new independent agency created for such purpose . . ."[13]

---

[13]As we have shown above (pp. 43-44), "enforcement" does not include the power to hear and decide violation cases. Compare, in this connection, Sections 2 and 3 of Executive Order 10494, quoted at p. 55, which distinguishes between "Administrative proceedings" and "Enforcement and investigation." If, on the other hand, "enforcement" were construed, as Appellants frequently interpret the term, to include the power to hold administrative violation hearings, then there is additional language in Section 403(a) negativing the power to transfer functions of the Economic Stabilization Agency. The concluding part of the Section reads:

> "Such agency may utilize the services, information, and facilities of other agencies and departments of the Government, but such agency shall not delegate enforcement of any of the controls to be administered by it under this section to any other agency or department."

Under the above provision, on September 9, 1950 by Executive Order No. 10161, 15 Fed. Reg. 6105, the President "hereby created a new and independent agency to be known as the Economic Stabilization Agency" to administer the Title IV controls. This then was the agency, and no other, which could administer wage stabilization under the Congressional mandate.

b. Secondly, and, we believe, conclusively, Section 703(a) only authorized the President to delegate "any power or authority conferred upon him by this Act." Yet, the power or authority to impose penalties administratively through hearings, for violation of stabilization (under the assumptions in this entire point II of our brief, in accordance with Appellants' contentions) rested upon Section 405(b). But when the President issued his transfer order on October 16, 1953 (Executive Order 10494), Section 405(b), Title IV, "and all authority conferred thereunder" had terminated, under the express provisions of Section 717(a), *supra*, page 49 (Aplts. Br. Apdx. p. 86). Hence, as of October 16, 1953, he had no "power or authority conferred upon him by this Act" relative to stabilization which could be transferred or delegated.

3. *The 1942 stabilization experience does not support the asserted transfer power.* With no language in the Act authorizing the transfer, Appellants again have attempted to rely upon a comparison with what was done under the 1942 stabilization legislation (Aplts. Br. pp. 72-73, 75). But the situations are not remotely comparable. Executive Order No. 9809 of December 12, 1946, 11 Fed. Reg. 1428 (Aplts. Br. p. 75), which transferred wage stabilization functions to the Treasury, was issued "by virtue of the authority" vested in the Presi-

BLEED THROUGH

BLURRED COPY

dent by "Title I of the First War Powers Act, 1941, Title III of the Second War Powers Act, 1942, . . . and section 2 of the Stabilization Act of 1942." In addition to the War Powers Acts, the Stabilization Act of 1942 was then still in effect (60 Stat. 664, 50 U.S.C. App. §966 (1946)), and Section 2 thereof authorized transfer and delegation of powers without limitation. Similarly, the Appellants mistakenly place reliance (Aplts. Br. pp. 67, 69, 77) on *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 67 S.Ct. 1129 (1947), and *United States v. Allied Oil Corp.*, 341 U.S. 1, 71 S.Ct. 544 (1951). The former held that the transfer of functions from the Office of Price Administration to the Office of Temporary Controls was authorized by Section 1 of the First War Powers Act of 1941 (55 Stat. 838, 50 U.S.C. App. §601 (1946)), and the latter merely reaffirmed the former. In the instant situation there are no existing acts authorizing the transfer. The very fact that Congress provided in Section 717(b)(3) of the Defense Production Act of 1950 that the agency's functions could continue in liquidation for six months after the expiration of controls (another circumstance distinguishing the 1942 legislation) is a compelling indication that Congress expected this entire program to be wound up by the end of that six months period, and hence there would be no necessity for continuing the agency or transferring its functions. And there is nothing in the 1953 Senate Appropriation Committee Report (Aplts. Br. pp. 56, 74), which was issued prior to the October 31, 1953 final termination date and with Section 706(b)—providing for jurisdiction in the federal courts and the Attorney General—still in effect, suggesting that the members of that Committee had any different ideas.

C. No Savings Statute Authorizes Continuance of the Proceedings Enjoined.

It apparently is not disputed by the Appellants that in view of the termination of Title IV of the Act, any liability thereunder ceased, unless a "savings" clause continues the liability in effect. The Appellants argue that there is such a savings clause and that it not only preserves the remedy but the tribunal. We do not believe the pertinent statutes can be so construed.

1. *Savings clause of the Defense Production Act.* Section 706(b) of the Defense Production Act of 1950 (Aplts. Br. Apdx. pp. 84-85) does contain a savings clause. It provides, in this connection:

> "The termination of the authority granted in any title or section of this Act, or of any rule, regulation, or order issued thereunder, shall not operate to defeat any suit, action or prosecution, whether theretofore or thereafter commenced, with respect to any right, liability, or offense incurred or committed prior to the termination date of such title or of such rule, regulation, or order . . ."

The above savings clause, however, does not preserve any liability in any administrative proceeding because its only effect is to permit any "suit, action, or prosecution." These terms do not extend to an administrative hearing, as distinguished from a judicial proceeding. "Suit" and "action" are customarily used to differentiate between an equity proceeding and one on the "law" side of a judicial controversy. *County of Upshur v. Rich*, 135 U.S. 467, 10 S.Ct. 651 (1894); *Weston v. City Council of Charleston*, 2 Peters 449 (U.S. 1829); *Cohens v. Virginia*, 6 Wheat. 264 (U.S. 1820). The term "prosecu-

BLEED THROUGH

BLURRED COPY

tion" obviously refers to a criminal proceeding by indictment or information. *United States v. Reisinger,* 128 U.S. 398, 9 S.Ct. 99, 101 (1888); *Tennessee v. Davis,* 10 Otto 257 (U.S. 1880). The distinction between such judicial proceedings and an administrative hearing was recently recognized by Executive Order 10434 of February 6, 1953, 18 Fed. Reg. 809, which suspended the wage stabilization program under Title IV of the Act. This order contained a savings clause of its own to the effect that the suspension would not operate to defeat any "suit, action, prosecution, or *administrative proceeding*" (emphasis added).

Appellants, who rely solely on the General Savings Statute (Aplts. Br. p. 67, point "A"),[14] concede the "omission" of Section 706(b) "to spell out coverage of the administrative enforcement procedure."[15] Any right,

---

[14]The Appellants assert also, almost parenthetically, that Section 705(a), from which they quote, continues to authorize administrative violation proceedings (Aplts. Br. p. 76). But it never did, as we pointed out above, pp. 33-35. Appellants, italicizing the language, appear to deem it significant that the investigatory powers granted in that Section continue for two years after the Act ceases to be in effect. But this provision in this respect is merely a counterpart to the saving of judicial remedies by Section 706(b). Investigations in connection with criminal prosecutions or damage and other civil actions, which under Section 706(b) could be maintained after termination of the Act, would require the continuing investigatory power. Other reasons for the additional two-year investigation authority, unrelated to the maintenance of administrative hearings under Section 405(b), are readily apparent.

[15]Appellants assert (Aplts. Br. p. 73) that Section 706(b) "was taken from Section 1(b) of the 1942 price control legislation," without quoting in the body of their brief or the appendix the provisions of Section 1(b) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U.S.C. App. §§ 901 *et seq.* (1946)). Actually, there is no justification for this assertion by Appellants. The two sections are dissimilar in more respects than they are comparable.

then, which Appellants may have after termination of Title IV to continue administrative hearings under Section 405(b) must be found elsewhere.

2. *General Savings Statute.* Appellants do assert that the liability, remedy, and forum are maintained by the General Savings Statute (61 Stat. 635 (1947), 1 U.S.C. § 109 (Supp. V 1952); Aplts. Br. p. 67), and that (Aplts. Br. p. 66) that Statute applies "in the absence of an express provision in the temporary legislation to the contrary."[16] Both such propositions are untenable.

The General Savings Statute has no applicability herein whatsoever because, so far as liability under the Defense Production Act of 1950 is concerned, it is superseded by the specific savings provision in Section 706(b) of the later Act. As this Court observed in *Hertz v. Woodman*, 218 U.S. 205, 218, 30 S.Ct. 621, 625 (1910):

> "The repealing act here involved includes a savings clause, and if it necessarily, or by clear implication, conflicts with the general rule declared in Section 13, the latest expression of the legislative will must prevail."

("Section 13" refers to the Revised Statutes from which the General Savings Statute was codified into 1 U.S.C. § 109 (Supp. V 1952)). To the same effect is *Great Northern Ry. v. United States*, 208 U.S. 452, 465, 28 S.Ct. 313, 316 (1907):

> "As the Section of the Revised Statutes in question has only the force of a statute, its provisions

[16]Appellants again mistakenly cite (Aplts. Br. p. 67) *United States v. Allied Oil Corp.*, 341 U.S. 1, 5, 71 S.Ct. 544 (1951), and *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 67 S.Ct. 1129 (1947), relative to the alleged primary purpose of the General Savings Statute. Neither holds or has any language bearing on such purpose.

BLEED THROUGH

BLURRED COPY

> cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication, in a subsequent enactment."

Where, as here, in a temporary statute Congress specifically sets forth a saving clause covering in the main the same scope as the General Savings Statute, but with significant omissions therefrom, it must be held that the later specific clause supersedes the earlier, general statute. Otherwise, we must impute to Congress an intent to insert in Section 706(b) absolutely meaningless and useless language. Is there any doubt that if the savings language in Section 706(b) was broader than that in the General Savings Statute the former would control?

Further, not only is the liability in an administrative proceeding not preserved by the General Savings Statute, but in the instant case there is no remedy or tribunal preserved to try the question of liability. *Cf. Bruner v. United States,* 343 U.S. 112, 72 S.Ct. 581 (1952); *Hallowell v. Commons,* 239 U.S. 506, 36 S.Ct. 202 (1915); *Hertz v. Woodman,* 218 U.S. 205, 30 S.Ct. 621 (1910); *Great Northern Ry. v. United States,* 208 U.S. 452, 28 S.Ct. 313 (1907). In this connection, Appellants rely (Aplts. Br. p. 68) on the case of *De La Rama S.S. Co. v. United States,* 344 U.S. 386, 73 S.Ct. 381 (1953). But that decision is distinguishable on many grounds.

In the first place, the action was one to recover from the Government on a war risk policy issued by the War Shipping Administration. Due process required that the petitioner be sustained, for, as the Court observed (344 U.S. at 388, 73 S.Ct. at 382):

> "Apart from R.S. § 13, the Constitution precludes extinction of the Government's liability."

Secondly, that case did not involve, as here, the termination of a statute which had its own savings clause. And in this connection it is significant that the specific savings clause of Section 706(b) does not contain the language of the General Savings Statute that "such statute shall be treated as still remaining in force for the purpose of sustaining any proper action," etc.

Thirdly, it was not held that the General Savings Statute authorized the continuance of a temporary tribunal or the transfer of jurisdiction from one tribunal to another. The repealed statute had placed jurisdiction in the U. S. District Courts which, of course, were continuing to function.[17] We think the fallacy of Appellants' view is here made obvious. If, as we contend, the Court finds that the administration of Title IV by the Economic Stabilization Agency could not be delegated or transferred, how would the continuance of the agency be financed after the expiration of the period for termination of the agency under Section 717(b)(3)? This Court has never held that the General Savings Statute authorizes either the continuance in effect of an agency or tribunal beyond the period specifically prescribed by Congress, or the transfer of the functions to another agency.

Finally, some months after the decision in *De La Rama S.S. Co.* this Court declared in *Bridges v. United States*, 346 U.S. 209, 227, n. 25, 73 S.Ct. 1055, 1065 (1953), that, "the general saving clause that was in the Revised Statutes . . . has been regarded as not applicable to matters of remedy and procedure."

---

[17]It is also true that in the National Labor Relations Act cases relied on (Aplts. Br. p. 68), the tribunal—the National Labor Relations Board—was continuing in existence, and not by virtue of the General Savings Statute.

BLEED THROUGH

BLURRED COPY

In concluding this discussion, we submit that there are many provisions in the Defense Production Act of 1950 requiring a finding that Congress intended a prompt winding up of stabilization with the termination of the agency and proceedings, saving only those liabilities and remedies prescribed by Section 706(b). In addition to the general discussion earlier as to Congress' impatience with stabilization, the following are here particularly significant: (a) The insistence in Section 403(a) that stabilization be administered by a new and independent agency; (b) The specific requirement by Section 717 (b)(3) that the agency liquidate within six months after termination of Title IV; (c) The absence of any provision relative to transfer of functions after such termination; (d) The savings clause in Section 706(b); (e) And finally, the fact that Congress made specific provision for certain problems arising upon the termination of the agency. Thus, Section 717(c) provides in part:

> "The termination of any section of this Act, or of any agency or corporation utilized under this Act, shall not affect . . . the taking of any action necessary to preserve or protect the interest of the United States in any amounts advanced or paid out in carrying on operations under this Act."

Congress, therefore, gave consideration to the problems involved upon termination of the Act and its adoption of language in Section 706(b) more restrictive than that in

the General Savings Statute must be held to reflect an intent to supersede the latter statute.[18]

The foregoing provisions all indicate a consistent pattern, with the intention of a rapid wind-up of any administrative proceedings and agencies authorized, not later than October 31, 1953. The General Savings Statute is inapplicable, the provisions covering preservation of liabilities being contained in Section 706(b). Since that Section does not save liabilities enforceable only in an administrative proceeding, and since, in any event, no authority existed to "transfer" the stabilization functions to the Office of Defense Mobilization, there does not now exist any lawful administrative agency with power to try Appellee. Consequently, the injunction granted by the trial court should be sustained even though it should be held that Section 405(b), while it was in effect, authorized administrative adjudication of violations.

---

[18]With reference to the Appellants' overworked argument (Aplts. Br. pp. 69, 71-73, 75) as to the significance of the 1942 wage legislation and what the Government did thereunder (as distinguished from what may have been lawful), the short and simple answer is, as Appellants concede (Aplts. Br. p. 72), that the Stabilization Act of 1942 did not contain any specific savings clause, nor did it have a six months agency liquidation provision, and so on. Hence the General Savings Statute was applicable.

Of even less value is the reference (Aplts. Br. p. 76) to Mr. Fleming's comment to the Senate Appropriations Committee about the necessity upon termination of shifting his agency's functions to some other agency. Senator Ellender immediately rejoined, "Would Justice have the right to take it over without any further appropriation or change in the law?" *Hearings before Senate Committee on Appropriations on Supplemental Appropriation Bill, H.R. 6200,* 83d Cong., 1st Sess. 431 (1953).

BLEED THROUGH

BLURRED COPY

III.

The Regulations and Orders Under Which the Agency Purports to Proceed Against Appellee Are in Direct Conflict With Various Provisions of the Act.

In addition to the National Enforcement Commission's usurpation of the power of the district courts, and to the unauthorized continuance of administrative disallowance proceedings after expiration of Title IV, there are other flagrant inconsistencies between the regulations and the Act which render the threatened administrative action a nullity.

A. The Regulations Establishing Disallowance Procedures Are Invalid Under Section 709 Because of the Absence of a Statement of Considerations.

Congress was concerned that those affected by the Act be consulted with respect to regulations promulgated under the Act. This concern was expressed at least twice in the Act. Yet so positive a mandate as this was ignored in the promulgation of several of the most important Economic Stabilization Agency regulations.

Section 404 (64 Stat. 807, 50 U.S.C. App. § 2104 (Supp. V 1952)) provides:

> "In carrying out the provisions of this title, the President shall, so far as practicable, advise and consult with, and establish and utilize committees of, representatives of persons substantially affected by regulations or orders issued hereunder."

Implementing this provision, section 709 (64 Stat. 819, 50 U.S.C. App. § 2159 (Supp. V 1952)) provides:

> "The functions exercised under this Act shall be excluded from the operation of the Administrative Pro-

cedure Act (60 Stat. 237) except as to the requirements of section 3 thereof. Any rule, regulation or order, or amendment thereto, issued under authority of this Act shall be accompanied by a statement that in the formulation thereof there has been consultation with industry representatives, including trade association representatives, and that consideration has been given to their recommendations, or that special circumstances have rendered such consultation impracticable or contrary to the interest of the national defense, but no such rule, regulation, or order shall be invalid by reason of any subsequent finding by judicial or other authority that such a statement is inaccurate."

The requirement of Section 709 was ignored by the Economic Stabilization Administrator in the promulgation of the very regulations under which Appellants claim authority to act. Thus General Order 15, prescribing standards for disallowance, completely omits any such statement, both in its original form (17 Fed. Reg. 2994) and as amended (17 Fed. Reg. 9977). General Order 18, establishing the National Enforcement Commission, similarly omits any such statement (17 Fed. Reg. 6925, 9977). In General Procedural Regulation 1, Revised, establishing the procedure to be followed before the National Enforcement Commission, there is perhaps a recognition that a statement of considerations was required in the recital that:

> "In the formulation of this regulation, due consideration has been given to the standards and procedures set forth in Titles IV and VII of the Defense Production Act of 1950, as amended, hereinafter referred to as the Act." 17 Fed. Reg. 7737, 7738.

BLEED THROUGH

BLURRED COPY

But this is not, of course, compliance with the requirement of Section 709. Finally, General Administrative Order I-2 (18 Fed. Reg. 6966, Oct. 26, 1953) issued by the Director of the Office of Defense Mobilization, adopting the three regulations already referred to for the purpose of continuing administrative enforcement proceedings under Executive Order 10494 (18 Fed. Reg. 6585), contains no such statement.

It is submitted that the failure to include a statement of considerations in any of the above regulations causes them to be invalid. It is clearly implied, by the provision that an *inaccurate* statement should not be held "invalid," that the complete absence of any statement does render a regulation "invalid." And the importance which Congress attached to such consultation—shown by the fact that two separate sections are concerned with consultation and by the use in both instances of the mandatory "shall" —justifies holding these regulations invalid.

The fact that consultation could be avoided if it were impracticable and the agency so stated, does not mean that no attention needed to be given to the requirement. The provision that a statement could not be held invalid if found to be inaccurate was only intended to prevent collateral inquiries; Congress could assume that a statement was true since consultation could be avoided upon the agency's finding that it was impracticable and so stating.

That the section applies to the regulations in question is clear since it applied to "any rule, regulation or order, or amendment thereto, issued under authority of this Act." Indeed, its application to procedural regulations is made particularly clear by the first sentence of the sec-

tion, which specifically adopts the requirements of the Administrative Procedure Act relative to publication of procedural regulations.

B. The Collapse of the Tri-Partite Wage Stabilization Board Destroyed the Section 403(b) Scheme for Administration of Wage Controls.

When Congress in 1952 reconstituted the Wage Stabilization Board and made it a statutory agency (Section 403(b), 66 Stat. 300, 50 U.S.C. App. § 2103(b) (Supp. 1953)), it conferred upon the Board new functions which were intended to have substantial effect on administration of the wage stabilization program. Those functions pertinent to the present case were set out as follows in subsection 403(b)(5):

> "(5) The Board shall, under the supervision and direction of the Economic Stabilization Administrator—
>
> (A) formulate, and recommend to such Administrator for promulgation, general policies and general regulations relating to the stabilization of wages, salaries, and other compensation; and
>
> (B) upon the request of (i) any person substantially affected thereby, or (ii) any Federal department or agency whose functions, as provided by law, may be affected thereby or may have an effect thereon, advise as to the interpretation, or the application to particular circumstances, of policies and regulations promulgated by such Administrator which relate to the stabilization of wages, salaries and other compensation."

BLEED THROUGH

BLURRED COPY

Thus, this Section vested primary responsibility for formulation of regulations and for interpretation of their application to specific cases, in the new tri-partite Board. The clause quoted was taken from the Senate bill, and the Senate Committee said of it:

> "This authorizes the Board, under the supervision and direction of the Administrator, to issue rulings and decisions in particular cases arising under wage stabilization." Sen. Rep. No. 1599, 82d Cong., 2d Sess. 28 (1952).

The tri-partite character of the Board was the subject of vigorous dispute in Congress. See H.R. Rep. 2352, 82d Cong., 2d Sess. 23 (1952). This choice of composition reflected a Congressional belief that the interests of labor and industry would best be protected thereby.

Both the creation of a Board of tri-partite character, and the delegation to it of powers to "issue rulings and decisions in particular cases," call attention to Congress' intention that *all aspects* of wage regulation be supervised by a Board on which the interests of each group affected were represented. Indeed, the cited powers of the new Board would have entitled Appellee to obtain an interpretation from the Board with respect to the legality of Appellee's wage increases, which interpretation, if favorable, would have carried great weight in any court proceeding, or, if the administrative enforcement procedure were valid would have been binding upon the National Enforcement Commission. Accordingly, it is clear that the availability of a Board ruling was, and was

intended to be, an integral part of a defense to a prosecution or other action for violation of wage regulations.

However, on December 6, 1952, the industry members of the Board resigned and were never replaced [R. 21]. Thus, almost within a month of the filing of the complaint against Appellee, and prior to the National Enforcement Commission's order amending said complaint, in response to Appellee's motion for a more definite statement [R. 3-4, 22], the new statutory route through which Appellee might have obtained relief was closed.

Substituted in place of the statutory Board was a "Wage Stabilization Committee," which was composed of the public members of the collapsed Board (General Order 19, 17 Fed. Reg. 11368). This Committee could not, of course, exercise the powers specifically delegated by statute to the tri-partite Board. Yet there was no attempt to fill the vacancies on the Board, although its term of office extended under statute to May 1, 1953, the date at which all Title IV powers expired. In place of the procedures established by Congress, procedures were substituted which were in direct conflict with the carefully considered Congressional mandate. And as a result Appellee's real administrative remedies disappeared. Without their restoration, all basis for Appellants' asserted power to take any action against Appellee was destroyed.

BLEED THROUGH

BLURRED COPY

C. In Authorizing Penalties Over and Above That Part of a Wage Payment Determined to Be Illegal, the Regulations Contravened Section 405(b).

Section 405(b) provides only for the disallowance of any wage, salary or compensation "payment made in contravention" of the regulations. Now, if employer and employee agreed that a salary increase should take the form of a cost-of-living bonus and if the bonus were illegal, it could not be contended that the continued payment of the basic salary (as distinguished from the bonus) suddenly became a "payment in contravention." Clearly the only "payment in contravention" would be the actual payment of the cost-of-living bonus itself. And there can logically be no distinction if the salary itself were illegally increased to provide additional compensation in the same amount. Only the amount of the increase would constitute a "payment in contravention."

However, Section 4(b) of General Order 15 (17 Fed. Reg. 2994, 9977) provides that the "entire amount" of the wage or salary paid, "not merely the amount paid in excess of the legal maximum of such wage (or) salary," shall be disallowed unless certain mitigating circumstances exist. This is not what Congress intended.[18a] The standard adopted, disallowance of the entire amount, bears no relation to the damage resulting from a violation. Thus,

---

[18a]The contrary point of view expressed in *Woodworth v. Kavanagh*, 102 F. Supp. 9 (E.D. Mich. 1952), *aff'd per cur.* 202 F.2d 154 (6th Cir., 1953), under Section 5(a) of the Stabilization Act of 1942, in a ruling upon the government's motion to dismiss is simply not convincing. See pp. 103-104, *infra*.

as construed by the Economic Stabilization Administrator, the disallowance sanction becomes highly penal. Furthermore, disallowance of the entire amount effects utterly arbitrary discrimination among employers. The illegal raise of a highly paid employee's salary to the extent of a few cents, draws a more drastic sanction than the doubling of a low wage, and as the bonus illustration above shows, the regulation makes the amount of the penalty depend upon the form selected for the increase and not its substance. This administrative construction should be rejected, if for no other reason, in order to avoid the very real constitutional difficulties which the above discussion suggests, and which are more fully discussed below.

D. In Authorizing the Retroactive Imposition of Penalties, the Regulations Also Were Invalid.

Wages were first stabilized on January 26, 1951, when General Wage Regulation 1 was issued (16 Fed. Reg. 816). At such time, while the statute directed the President to prescribe the extent to which wage payments made in violation of regulation should be disregarded for certain purposes, no such regulation had been issued.

Disallowance was obviously not intended to be made available as a sanction until the powers delegated by the Section were exercised, for the regulation contemplated was substantive. Classifications were required: "the extent to which" the excess paid in violation was to be disallowed might depend upon the wilfulness of the violation

BLEED THROUGH

BLURRED COPY

and this remained to be defined; the circumstances under which the disallowance would be made for tax purposes, for government contract purposes, or for other purposes, remained to be described. Until such a regulation was issued, no one could have any idea of the magnitude of the penalty which might be incurred by a violation.

No such regulation was issued for almost five months after the wage freeze. The first approach toward definition of the specific penalties applicable under Section 405(b) was the Wage Stabilization Board's Enforcement Resolution issued in June of 1951 (16 Fed. Reg. 6028). The resolution was apparently not intended to operate retroactively; however, General Order 15 as amended (17 Fed. Reg. 2994, 9977), which amplifies the provisions of the Enforcement Resolution and other regulations issued subsequently thereto, and which is the last regulation defining the standards for disallowance, requires retroactive application. Section 3 of this Order provides that the National Enforcement Commission has authority "to determine whether any wage, salary or other compensation has been paid or accrued, *at any time,* in violation of any provision of the Defense Production Act of 1950, as amended, or any regulation or order or directive heretofore or hereafter promulgated under the Act, . . . and further to determine the amount of payments or accruals to be disregarded and disallowed" (17 Fed. Reg. 9977, emphasis added).

Since Appellee's alleged violations of the regulations began January 26, 1951 [R. 10], and for the most part were challenged only up to April 1, 1951 [R. 46-48, 61, 77-78], the Appellants' attempted application of Section 405(b) was clearly retroactive as to Appellee. Yet there is nothing in that Section which permits retroactive application of the penalties authorized, and in the absence of an unequivocal legislative expression that retroactive operation was intended, a statute will not be construed to authorize regulations with retroactive effect. *Miller v. United States,* 294 U.S. 435, 439, 55 S.Ct. 440, 442 (1935). That rule is particularly applicable here, since serious constitutional questions are raised in the case of a retroactive penalty. *Cf. Untermyer v. Anderson,* 276 U.S. 440, 48 S.Ct. 353 (1928) holding a retroactive gift tax unconstitutional; a retroactive penalty of course presents an even stronger case. Considering the interpretation placed upon 405(b) by these regulations, which required disallowance not only of the excess but of the entire amount of the wage, we have retroactivity with a vengeance.

Most of Appellee's allegedly violative wage payments cannot be disallowed except by retroactive interpretation of General Order 15, and Appellee faces a withdrawal of credit, and irreparable injury, if an Enforcement Commissioner finds on the basis of General Order 15 that such wages should be disallowed. Thus, the invalid retroactive application of the Order is a particularly strong ground on which to base affirmance of the decision below.

BLEED THROUGH

BLURRED COPY

IV.

Title IV of the Defense Production Act of 1950 Is Unconstitutional.

While the District Court properly avoided [R. 35] the constitutional issues raised by the complaint [R. 6, 7], we respectfully urge these issues before this Court as constituting additional support for the judgment below and as proper issues to be determined by this Court in the event it fails to affirm said lower court's decision upon one or more of the grounds hereinabove set forth. These constitutional issues are definitely presented for decision if Appellants' construction of the Act is accepted.

We have discussed the matters raised in Points I and II quite fully in this brief because we believe that each Point alone requires an affirmance of the lower court's decision. But because of the limitations of time, the already great length of this brief and the basis of the District Court's decision, we have dealt with the following constitutional issues in a rather summary fashion. This should not be taken as an indication that Appellee believes that any one of the objections is lacking in merit. While recognizing that these issues are of varying merit and that probably neither this Court nor any single judge would agree with Appellee on all of the constitutional objections presented, we submit that this Court should find with Appellee on one or more of the issues that follow.

A. The Act Is Invalid Under the Fifth Amendment in Depriving Appellee of Its Property Without Due Process of Law.

Preliminarily to discussing some of the specific respects in which the Act is in conflict with the United States Constitution the Court's attention is called to the penalty allegedly permitted thereunder. Under standards contained in General Order No. 15 (17 Fed. Reg. 2994, 9977) issued by the Economic Stabilization Administrator, it is asserted by the Appellants that the total illegal wage paid by Appellee was $5,561,484.11 [R. 46-48, 61, 77-78]. This means that if Appellants establish their case of claimed illegality, the potential penalty confronting Appellee is a federal income tax deficiency of $3,750,046.60 [R. 57, 59; Pltf. Exs. H and J] or the denial of Government contract reimbursements[19] in the amount of $5,561,484.11! The authorization by, or allowance of any such penalty under the Act is, we submit, contrary to the Constitution.

1. *Lack of judicial review.* No provision is made in the Defense Production Act of 1950 for judicial determination of the validity of wage and salary regulations other than in a suit to determine violations under Section 706(b) (64 Stat. 817, 50 U.S.C. App. (Supp. V) § 2156(b)), although there is detailed provision in Sections 407 and 408 (64 Stat. 807, 808, 50 U.S.C. App.

---

[19]While Appellee realizes that in the actual practice, the purported administrative penalty has been limited to a disallowance of wages for income tax purposes (Aplt's. Br., pp. 6-7), the Appellants have never conceded that they would be so limited in any penalty they might desire to impose upon Appellee. On the contrary, their administrative complaint [R. 8-10] contains the opposite inference.

BLEED THROUGH

BLURRED COPY

(Supp. V) §§ 2107, 2108) for such review of price regulations. This lack of provision for review in the statute itself, taken in conjunction with the Congressional history explaining the reason for such absence (96 Cong. Rec. 12133, 12480, 14072-14073), shows persuasively that Congress intended that such regulations not be subject to prior review. However practical the reason for this withdrawal of review, it clearly contravenes the due process clause of the Fifth Amendment. *Ng Fung Ho v. White*, 259 U.S. 276, 42 S.Ct. 492 (1922); see *Estep v. United States*, 327 U.S. 114, 120, 66 S.Ct. 423, 426 (1945).

The Defense Production Act of 1950 requires a person to submit to all regulations, valid and invalid alike, upon the threat of a heavy penalty. A requirement such as this has been condemned by this Court in prior cases of unimpaired authority such as *Southwestern Telephone & Telegraph Co. v. Danaher*, 238 U.S. 482, 490, 35 S.Ct. 886, 888 (1914), "There was no mode of judicially testing the regulation's reasonableness in advance of acting under it . . . In these circumstances to inflict upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law": and *Wadley Southern R. Co. v. Georgia*, 235 U.S. 651, 662, 35 S.Ct. 214, 218 (1914), ". . . A statute, therefore, which imposes heavy penalties for violations of commands of an unascertained quality is, in its nature, somewhat akin to an *ex post facto* law, since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position

where he himself must, at his own risk, pass upon the question. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid."

But Appellants apparently claim that some type of judicial review of any administrative enforcement proceeding can be obtained at a later time (Aplts. Br. pp. 38-41). However, under their theory of a right to administratively determine violations the Defense Production Act of 1950 makes no provision for such review and the Economic Stabilization Administrator has asserted by regulations that any such administrative determination is final and not subject to review. This assertion is made in Section 6 of General Order No. 15 (Aplts. Br. Apdx. pp. 89-93) which states in part:

> ". . . Any determination made . . . shall be final and not subject to review by the Tax Court of the United States or by any court in any civil proceeding";

and in General Procedural Regulation No. 1, Revised, (Sections 5.2(c), 6.1, Aplts. Br. Apdx. p. 103) in which it is provided that:

> "the findings and determination of the National Enforcement Commission shall be final";

BLEED THROUGH

BLURRED COPY

and that:

> "The certificate of disallowance shall be conclusive for the purposes stated therein."

Appellants fail to negate the above quoted language of General Order No. 15 (Aplts. Br. p. 40) or deny that a motion to dismiss based on this Order would be filed in any such subsequent judicial proceeding.[20] In connection with the latter point, it should be observed that in the one instance where district court review was sought of disallowance penalties administratively imposed for wage violations during World War II, the petitioner was met by a government motion to dismiss, which sought to preclude review of the merits of the administrative action.[21]

This case illustrates the hollowness of the argument that Appellee should be willing to risk an administrative finding of violation and the consequent issuance of a certificate of tax disallowance, to pay the tax, and to bring suit for refund in the district court—even assuming Appellee could afford to pay the tax deficiency so assessed.

---

[20]It should be noted that General Order No. 15 (17 Fed. Reg. 2994, 9977) has remained the same throughout this present litigation even though the same argument as to subsequent judicial review was urged upon the lower court during the hearing on the preliminary injunction. As a matter of fact, this Order was recently reaffirmed by Appellants. (General Administrative Order I-2, effective Nov. 1, 1953, 18 Fed. Reg. 6966).

[21]See *N. A. Woodworth Co. v. Kavanagh*, 102 F. Supp. 9 (Mich., 1952), *aff'd without opinion*, 202 F.2d 154 (6th Cir. 1953), a case involving the Stabilization Act of 1942 (56 Stat. 765, 50 U.S.C. App. §§ 961 *et seq.*), where the motion to dismiss was made upon the ground that by regulation "it was specifically provided that any determination of said National War Labor Board shall be final and shall not be subject to review by any court in any civil proceeding."

which the evidence clearly indicates it could not [R. 48-60, 54, 57, 58, 79; Pltf. Exs. G, H, I and J]. Nor is the suggestion (Aplts. Br. pp. 38-39) that Appellee could attack any deficiency in the Tax Court more helpful. Not only is the Tax Court itself an administrative tribunal where Appellee could not assert its right to a jury trial (see paragraph B, *infra,* pp. 84-86), but in view of what Appellee's financial condition would be upon issuance of a disallowance certificate [R. 37, 51-64], the obvious step to be taken immediately by the Commissioner of Internal Revenue would be the levy of a jeopardy assessment and the filing of a lien which would effectively destroy what might then be left of Appellee's ability to carry on its business. Finally, in the event of an adverse decision by the Tax Court, before plaintiff could obtain judicial review—and thus have its first day in a judicial forum under the course of procedure suggested by Appellants—it would be required to file a bond of up to twice the amount of the deficiency. Appellee might well find it impossible to meet this condition, in view of the above. No wonder Appellants would prefer that any judicial review of their illegal action be "postponed."

We therefore submit that the Defense Production Act of 1950 in denying judicial review of any wage regulation prior to a suit alleging a violation thereof, and the administrative action (General Order No. 15, 17 Fed. Reg. 2994, 9977; General Procedural Regulation 1, Revised, 17 Fed. Reg. 7737) purporting to prevent any challenge of the wage regulations even after an administrative determination of violation (assuming such a procedure is permissible) deprive Appellee of due process of law.

BLEED THROUGH

BLURRED COPY

2. *Other objections under the Fifth Amendment.* The regulations of the Economic Stabilization Administrator interpret the Act as authorizing disallowance of the entire amount of wage paid in violation of regulation, not only of the illegal excess (General Order 15, 17 Fed. Reg. 2994, 9977). While we submit that this construction is untenable, if the Act does authorize disallowance of the entire amount then it is clear that the penalty bears no relation either to the damage to the public interest or to the extent of the violation or to any other standard. In some cases, the amount of excess might have been very small and the remaining wage very large, while in others the amount of excess itself might have been very large. For example, the penalty would be the same where one employer unlawfully increases his wage rates by one cent an hour and another unlawfully increases his rates twenty-five cents an hour, if the total wages are the same. Thus, there is no statutory differentiation between the minor violation and the major violation and the lack thereof renders the penalty arbitrary and oppressive and constitutes a taking of property without due process of law. See *Missouri Pacific Railway Co. v. Tucker,* 230 U.S. 340, 351, 33 S.Ct. 961, 964 (1912), where a carrier collected a tariff of $3.02 in excess of the allowable and the statute provided for a liability for such overcharge in the amount of $500, the court, in holding the statute unconstitutional, declared:

> "As applied to cases like the present, the imposition of $500 as liquidated damages is not only grossly out of proportion to the possible actual damages, but is so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law and therefore in contravention of the Fourteenth Amendment."

Furthermore, application of the penalty of tax disallowance denies due process and equal protection of the law to the extent that different monetary penalties result solely because of the tax bracket of the particular employer-taxpayer and without relation to the degree of the violation.[22] Nor, it is significant to note, do the regulations governing the disallowance standards to be followed make any express provision for mitigating the effect of these inequalities, although providing for other mitigating circumstances (General Order 15, Aplts. Br. Apdx. pp. 89-93).

B. The Act Is Invalid Under the Sixth or Seventh Amendments in Depriving Appellee of the Right to a Jury Trial.

The disallowance provision of the statute, at least to the extent that the entire amount of a wage can be disallowed, clearly imposes a penalty[23] and in an action on a statutory penalty, analogous to the common law action of debt, the constitutional right to a jury trial must be recognized. *Leimer v. Woods,* 196 F.2d 828, 834 (8th Cir. 1952); *People ex rel. Lemon v. Elnore,* 256 N.Y.

---

[22]To illustrate: if identical disallowances of wages, in the amount of $100,000 were imposed on two corporate employers with identical wage situations except that one had a $100,000 income tax loss in the year of violation and the other for such year was subject to the excess profits tax, the former would suffer no penalty while the latter could be penalized $82,000 plus interest!

[23]*Cf. Bowles v. Farmers National Bank of Lebanon,* 147 F.2d 425, 428-429 (CCA 6th, 1945) ("Moreover, if the sum of money is to be recovered by a third person for violation of a statute instead of the person injured . . . or if the sum exacted is greatly disproportionate to the actual loss . . . it constitutes a penalty rather than damages. The fact that the sum is to be recovered in a civil action does not determine the nature of the action.").

BLEED THROUGH

BLURRED COPY

489, 177 N.E. 14 (1931). And see *United States v.* Regan, 232 U.S. 37, 47, 34 S.Ct. 213, 216-217 (1913), where the Government brought an action of debt to recover a statutory penalty under the Alien Immigration Act (34 Stat. at L. 898, Chap. 1134). The Court stated:

> "While the defendant was entitled to have the issue tried before a jury, this right did not arise from article 3 of the Constitution or from the 6th Amendment, for both relate to prosecutions which are strictly criminal in their nature (citations), but it did arise out of the fact that in a civil action of debt involving more than $20 a jury trial is demandable."

Yet no jury trial is available in administrative disallowance proceedings which Appellants claim are authorized by the Act. While it may be asserted that the imposition of penalties for wage violation is not a proceeding known to the common law, this fact does not furnish the premise for an argument that the right to a jury trial need not be afforded, for it proves too much. If it were a complete answer to say that any administrative proceeding is an action unknown to the common law, then Congress could, by statutory enactment, destroy the right of trial by jury. By such specious reasoning the effectiveness of the Seventh Amendment would be completely nullified. *See United States v. Jepson,* 90 F. Supp. 983, 986 (N.J. 1950) (". . . To hold otherwise would be to open the way for Congress to nullify the constitutional right of trial by jury by mere statutory enactments. It is by such methods that courts lose their power to enforce the Bill of Rights.")

Cases such as *National Labor Relations Board v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 57 S.Ct. 615

(1937), and *Helvering v. Mitchell,* 303 U.S. 391, 58 S.Ct. 630 (1938), involved merely remedial sanctions and hence are distinguishable.

Finally, it should be noted that there are numerous instances of the right to a jury being guaranteed in a statute providing for the imposition of penalties in the event of violation. For example, the treble damages provision in the Sherman Act (38 Stat. 731 (1890), 15 U.S.C. § 15 (1946)) provides for suit in the district court and, of course, the parties have the right to a jury trial. *Meeker v. Lehigh Valley R.R.,* 162 Fed. 354 (2d Cir. 1908).

C. The Act Is Invalid Under the Eighth Amendment in Authorizing Excessive Fines.

The prescribed maximum fine for a willful violation of wage stabilization regulations is $10,000, Section 409(b), (64 Stat. 811, 50 U.S.C. (Supp. V) § 2109(b)); *cf. United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218, 73 S.Ct. 227 (1952). Yet the actual penalty sought to be imposed by Appellants for an alleged unintentional violation amounts to several million dollars [R. 48, 58, 77; Pltf. Ex. J]. The punishment would clearly be disproportionate to the offense; *cf. Weems v. United States,* 217 U.S. 349, 30 S.Ct. 544 (1910); and constitutes an excessive fine in violation of the Eighth Amendment.

In *N. A. Woodworth Co. v. Kavanagh,* 102 F. Supp. 9 (E.D. Mich., 1952), *aff'd without opinion,* 202 F.2d 154

BLEED THROUGH

BLURRED COPY

(6th Cir. 1953), the lower court held that Section 5(a) of the Economic Stabilization Act of 1942 (56 Stat. 767, 50 U.S.C. App. § 965 (1946)), containing language similar to Section 405(b) of the Defense Production Act of 1950, did not violate the Eighth Amendment. However, the only argument presented to the judge was on the question raised by the Government's motion to dismiss on the ground that under the Executive orders judicial review was not permitted. This decision was affirmed without opinion by the Sixth Circuit Court of Appeals. However, it is not known whether the Court ruled on this issue—the Government claimed on appeal that the appellant had not properly raised and preserved its constitutional and statutory objections.

D. The Act Is Invalid Under Article I, Section 9, Clause 4 in Authorizing an Unapportioned Direct Tax.

The disallowance of wage payments for tax purposes results in the imposition of a tax on gross receipts which is not apportioned. Under Article I, Section 9, Clause 4 of the Constitution, a tax on gross receipts is unconstitutional unless apportioned. *Pollack v. Farmers Loan and Trust Co.*, 157 U.S. 429, 15 S.Ct. 673 (1895). By the statutory device of disallowance, the right to include wages as part of the cost of goods or services sold for income tax purposes is impaired. Since Appellee is engaged in selling the services of its employees such a disallowance would result in an imposition of a gross receipts tax on Appellee. This is not permitted by the Sixteenth Amendment because thereunder the cost of

goods or services sold, representing gross receipts, is not income in the constitutional sense. *Cf. Doyle v. Mitchell Bros.,* 247 U.S. 179, 38 S.Ct. 467 (1918); *Lela Sullenger,* 11 T.C. 1076 (1948). *But cf. Weather-Seal Mfg. Co. v. Commissioner,* 16 T.C. 1312, *aff'd mem.,* 199 F.2d 376 (6th Cir., 1952). See also *Commissioner v. Weisman,* 197 F.2d 221 (1st Cir., 1952), a case involving price disallowance, where the court carefully avoided the constitutional issue but nevertheless noted (p. 224, n. 1) that under Section 405(a) of the Defense Production Act of 1950, which is identical in effect with Section 405(b):

> "It is possible . . . that in effect the tax levied would amount to a gross receipts tax."

E. The Act Is Invalid Under Article I, Section 1 Because of the Improper Delegation of Legislative Power to the Executive.

Title IV of the Defense Production Act of 1950 (64 Stat. 803, 50 U.S.C. App. (Supp. V) §§ 2101 *et. seq.*) purportedly gave unlimited powers to the President relative to the imposition of wage controls, exceptions thereto, and the penalties for violation, without any real guides or standards to control him. While we believe that in all these respects the delegation is improper, that is particularly true with respect to Section 405(b) of the Act delegating to him the power to set forth the penalties for violations.

The President's delegated power under Section 405(b) is neither limited nor defined, even in general terms, nor is there even a suggestion that he should give consideration to any factors in arriving at a standard for any dis-

BLEED THROUGH

BLURRED COPY

allowance.[24] Under this authority presumably the Executive could make the standard of disallowance depend upon the size of the violator, the number of employees granted illegal increases (as contrasted to amount of the illegal payment), the location of the employer, the occupation of the employee, the industry of the employer, the income tax rate of the employer, the method of compensation, or any other standard which might strike his fancy.

It clearly appears that in granting the President this broad, sweeping, unqualified and unascertainable authority to fix the standards for disallowance of illegal wage payments Congress delegated its legislative power to the President in violation of Section 1 of Article I of the Constitution. *Cf. Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855 (1936); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241 (1935).

---

[24]A fact which clearly distinguishes cases validating a statutory grant of authority to the Executive which contained such general limitations or directions. See for example, *Yakus v. United States*, 321 U.S. 414, 427, 64 S.Ct. 660, 668 (1944) (". . . prices fixed shall be fair and equitable and that in addition they shall tend to promote the purposes of the Act, and that in promulgating them consideration shall be given to prices prevailing in a stated base period . . ."); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397, 60 S.Ct. 907, 914 (1940) (". . . the Commission may fix maximum prices when in the public interest it deems it necessary in order to protect the consumer against unreasonably high prices.")

F. The Act Is Invalid Under the Tenth Amendment in Attempting to Legislate on Matters Thereby Reserved to the States.

The power, if any, to impose maximum wage controls rests with the States under the Tenth Amendment. We are not here challenging the power of Congress to enact legislation pursuant to specific grants of powers given it under the Constitution[25] but in purporting to authorize wage controls in the Defense Production Act of 1950 (64 Stat. 798, 50 U.S.C. App. (Supp. V) §§ 2061 *et seq.*), Congress was not acting under any such prescribed powers. In this respect the Defense Production Act of 1950 differed from the Economic Stabilization Act of 1942 (56 Stat. 765, 50 U.S.C. App. §§ 961 *et seq.* (1946)) which was enacted during World War II. As of 1950, the cessation of the war with Japan, Congress has not declared war under its exclusive power granted by Article I, Section 8 of the Constitution. Therefore, we submit that neither the war power nor any other grant of specific constitutional power can be shown as authority for authorization of wage controls under the Defense Production Act of 1950.

---

[25]See *e.g., United States v. Darby*, 312 U.S. 657, 61 S.Ct. 451 (1941) (power to regulate interstate commerce); *Dooley v. United States*, 183 U.S. 154, 22 S.Ct. 62 (1901) (power to lay duties and imposts); *Cf. West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578 (1937) (state police power).

BLEED THROUGH

BLURRED COPY

V.

The District Court Had Power and Jurisdiction to Grant, and Properly Issued, the Injunction.

A. The Facts Proved at the Trial Support the District Court's Finding That Appellee Would Suffer Irreparable Injury of the Kind Sufficient to Justify Enjoining the Holding of the Administrative Hearing.

The claim of Appellants that Appellee failed to "prove the 'kind of injury' which is sufficient to make the doctrine of exhaustion of administrative remedies inapplicable" (Aplts. Br. p. 17), properly recognizes that the exhaustion principle applies, under any circumstances, only where there is an absence of "irreparable injury."

We start with the facts showing such injury. The three-judge district court found "that the continuance of the threatened administrative proceeding *will cause plaintiff's bank credit to be shut off* and *will disable plaintiff from continuing its operations*" [R. 37, emphasis added]. It also found that Appellee would be irreparably damaged for the following additional reasons, set forth in paragraph XV of the complaint [R. 26-28: the complaint had been amended pursuant to stipulation of counsel and approval of the court, R. 24, 30]:

(1) In order to prevent its bank credit from being shut off, Appellee would have to pay any income tax assessed as the result of a certification of disallowance, without prior challenge.

(2) The witnesses required to testify at an administrative hearing would be top executives whose absence from Appellee's plant in another state would substantially impair Appellee's ability to perform contracts with the U. S. Air Force.

(3) The overhanging threat of disallowance would prevent Appellee from entering into contracts and conducting and expanding its business in normal fashion.

(4) Preparation for and participation in the administrative hearing would cause substantial expense, in excess of $10.000.

Appellants' sole attack upon the evidentiary basis of these findings by the district court is made in a footnote (Aplts. Br. p. 35, n. 21). Here, it is suggested that allegations with respect to impairment of credit are difficult to answer, and that evidence in support thereof is difficult to refute. Are the studiously generalized observations in this footnote offered as a substitute for the absence of any facts weakening in any respect the evidence upon which the three judges below based their findings? Certainly it is novel doctrine that evidence of irreparable damage should not be given the usual weight because opposing counsel would find such evidence hard to rebut. At any rate, this is the extent of Appellants' attack upon the facts found by the district court.

Appellants do, however, argue that such facts do not, as a matter of law, support the conclusion that sufficient irreparable injury was shown to warrant an injunction (Aplts. Br. pp. 32-38). It is the substance of this argument that no amount of damage from an allegedly invalid administrative proceeding can justify prior resort to the courts. But the cases cited do not go so far; they merely show that the Court will examine carefully *allegations* of irreparable injury, which are frequently all that is before it, in order to determine whether specific harm is actually threatened.

BLEED THROUGH

BLURRED COPY

Thus in *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 67 S.Ct. 1493 (1947), no irreparable injury was shown by general allegations (quoted in Aptls. Br. at p. 37) that the appellant would be caused to run the risk of impaired credit or insolvency of its customers, "without specific allegation that any of them is seriously so threatened or facts to support such a claim" (331 U.S. at 778, 67 S.Ct. at 1506). In *United States v. Los Angeles & Salt Lake R. R.*, 273 U.S. 299, 47 S.Ct. 413 (1927), equitable jurisdiction could not be sustained upon the basis of general allegations to the effect that the carrier's credit with the public would be affected; it is notable that Appellants' detailed study of the record itself in that case (Aplts. Br. p. 36) disclosed only that these allegations respecting injury were no more detailed than reported by the Court in its opinion. In *Public Service Commission of Utah v. Wycoff Company, Inc.*, 344 U.S. 273, 73 S.Ct. 236 (1953) the trial court's judgment denying an injunction was affirmed because of the complete lack of any evidence as to threatened or probable acts of the defendants which might cause irreparable injury. In contrast to these cases, we point to the facts found by the district court below and discussed in its opinion as follows [R. 35]:

> "The evidence further showed that the *continuance* of the administrative proceedings with the overhanging threat of the disallowance penalties *would cause the banks to withdraw* the credit extended, resulting in a shut down of plaintiff's business, cancellation of its government contracts, and consequent bankruptcy" (emphasis added). 114 F. Supp. at 391.

It is the nature of the damage proved by Appellee herein which serves to distinguish this case from *Franklin v. Jonco Aircraft Corp.*, 346 U.S. 868, 74 S.Ct. 126 (1953).

Threaded through Appellants' entire discussion of the equity jurisdiction of the Court below is the suggestion that the administrative hearing "*might* have resulted in a finding that no violation on Appellee's part, or that if a violation had occurred, no disallowance or no more than a nominal disallowance was warranted in the light of the surrounding circumstances" (Aplts. Br. pp. 28-29, emphasis added). But it is the other side of the coin which concerns Appellee:

Total wage payments paid by Appellee in violation of the regulations, according to Appellants' allegations, amounted to $5,561,484.11. Of this sum, $755,305.50 was computed as the amount of the illegal excess (*supra*, p. 8). Under the Economic Stabilization Administrator's General Order 15, Section 4(b) (17 Fed. Reg. 2994, 9977), the former amount was subject to disallowance in the absence of a showing of extenuating or mitigating circumstances as defined therein, and if there were such circumstances, which Appellants have at no time conceded, the latter amount was disallowable, it being provided that if extenuating or mitigating facts were proved, nevertheless,

> ". . . the usual and general policy shall be to disallow an amount at least equal to that portion of any payment or accrual in excess of whatever payment was permissible under the governing regulation, order or determination."

It was established that extensions of bank credit in the amounts then being made under the loan agreement were

BLEED THROUGH

BLURRED COPY

vital to Appellee's continued operation, that such loans were Appellee's only assurance that it would have adequate working capital to meet heavy weekly payroll and other recurring expenses [R. 54-56].[26] It was shown that the current agreement would expire September 30, 1953 [R. 55]. The executive vice-president of the bank acting as agent for the several banks under the credit agreement, a man responsible for making recommendations to the bank's board of directors regarding loan policy [R. 62-63], testified as follows:

> "Q. Mr. Lawyer, if an enforcement commissioner of the National Enforcement Commission in a proceeding involving the Grand Central Aircraft Company should make findings and determinations that wages in the amount of $5,000,000 or more should be disallowed for income tax and or an alternatively contract reimbursement purposes for the year 1951, what would be your recommendation to the Board of Directors of your bank with reference to the requests from Grand Central Aircraft Company to extend the present credit agreement beyond September 30, 1953?
>
> The Witness: Under those circumstances, sir, I would give a negative recommendation to my Board of Directors with respect to the further extension of credit.
>
> Mr. Lund: Q. By saying 'negative' you mean you would recommend that the bank not extend the credit agreement, is that correct? A. That is correct.

---

[26]The evidence showed that during the 4-week period immediately before the trial, the average weekly receipts of Appellee, aside from loan receipts, amounted to $111,280.41. The average weekly payroll alone amounted to $228,061.27, and Appellee had other even greater operating expenses [R. 53-54, 79].

Q. Would that also be true if the enforcement commissioner's findings and determinations was that the amount of such disallowance should be $3,000,000? A. In my opinion, the recommendation should continue to be negative under those circumstances based on the financial condition of the company as I know it at this time.

Q. And would the same be true if the findings and determinations of the enforcement commissioner was for a disallowance of a million dollars? A. Yes.

Q. Three-quarters of a million dollars? A. Yes, sir." [R. 63-64].

Appellants argue (Aplts. Br. pp. 29-30) that only the National Enforcement Commission had authority to issue a certificate of tax disallowance, and that there could be no injury resulting from the proceedings before the Enforcement Commissioner. This argument overlooks the degree of finality which attached to the Enforcement Commissioner's determination. As provided in General Procedural Regulation 1, Revised, Section 4.1(f), 17 Fed. Reg. 7737, 18 Fed. Reg. 1663:

> "If no appeal is filed as hereinafter provided, the findings and determination of the Enforcement Commissioner shall, in the absence of clear and prejudicial error, be adopted by the National Enforcement Commissioner and a certificate of disallowance based thereon issue to the appropirate departments or agencies of the government."

More significantly, the argument overlooks the effect which such findings and determination would have on the banks extending credit to Appellee. As was shown in the testimony of the executive vice-president of the bank

BLEED THROUGH

BLURRED COPY

administering the loan, notwithstanding a theoretical right to appeal to the National Enforcement Commission, an Enforcement Commissioner's disallowance of any amount from the $5,000,000 maximum claimed, to $750,000, an amount less than the "ordinary and usual" minimum disallowance, would cause the banks to withdraw the vital credit being extended. Without such credit the Appellee would be forced into bankruptcy. Assuming, as Appellants now argue (contrary to the Agency's General Order No. 15) court review would be permissible after a final order of the National Enforcement Commission, it would not be available unless Appellee paid any tax deficiency assessed as the result of such order and sued for refund, or appealed from a Tax Court decision. We have already discussed the proof showing that neither of these courses would be available (*supra,* pp. 80-82).

Thus Appellants would require Appellee to gamble on the favorable outcome of an invalid administrative proceeding at the risk of being put out of business. Indeed, they argue, in effect, that even though Appellee would be put out of business by the action of third parties taken in direct response to the challenged administrative action, this damage is not the kind which brings a case within equity jurisdiction (Aplts. Br. p. 35). This is not the law.[27] *Utah Fuel Co. v. National Bituminous Coal Comm'n,* 806 U.S. 56, 59 S.Ct. 409 (1939) (damage from agency's release to public of confidential informa-

---

[27]The cases cited by Appellants in support of this assertion (Aplts. Br. pp. 36-37) simply did not involve a showing of actual damage, as pointed out *supra,* p. 93. No significance was attached by the Court in either of such cases to whether the source of the alleged damage was the decree of the agency itself, or the reaction of third parties to such decree.

tion relative to plaintiff's business would be irreparable). Included in the concept of irreparable injury is any injury which results from agency action, not just injury directly flowing from an agency order.

B. Exhaustion of Administrative Remedies Has Not Been Required Where Administrative Adjudicatory Procedure or Judicial Review Is Not Specifically Prescribed by Statute.

When the administrative complaint was first filed, Appellee moved to dismiss on the ground the National Enforcement Commission had no jurisdiction because of the invalidity of the Act and the regulations thereunder. This motion was dismissed, as have been similar motions made in other cases.[28] Appellee then sought an injunction.[29]

It is review of this denial of Appellee's motion which was sought in the district court, in an attempt to avoid the compulsive effect of the issuance of the complaint and the order for the administrative hearing. It is this com-

---

[28]*Wags Transportation Co.*, N.E.C. No. 88 (Sept. 1953) ("This Commission assumes the validity of the Act and the Regulations under which it operates"); *Gorneilus & Read Co.*, N.E.C. No. 121 (Sept. 10, 1953); *Gross Electric Co.*, N.E.C. No. 117 (Sept. 14, 1953); *Balworth Co.*, N.E.C. No. 111 (Sept. 1953). See also General Procedure Regulation 1, Revised, Section 10.1 (17 F.R. 7737), preventing challenge of regulations before the Commission. (*Supra*, p. 6.)

[29]The regional officials of the Wage Stabilization Board and of the National Enforcement Commission could be enjoined irrespective of service on national officials where the only relief sought was prevention of regional action against Appellee. *Williams v. Fanning*, 332 U.S. 490, 69 S.Ct. 188 (1947).

BLEED THROUGH

BLURRED COPY

pulsion which Appellee seeks to enjoin. See *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 67 S.Ct. 1146 (1947).

This Court has often passed upon the issue of administrative jurisdiction when such review is sought at the commencement of the administrative process. It has done so where impending irreparable injury is shown and where the questions presented relate to the constitutionality or statutory validity of administrative procedures. *Fahey v. Mallonee*, 332 U.S. 245, 67 S.Ct. 1552 (1947); *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 67 S.Ct. 1146 (1947); *Utah Fuel Co. v. National Bituminous Coal Comm'n*, 317 U.S. 456, 63 S.Ct. 369 (1943); *Smith v. Cahoon*, 283 U.S. 553, 51 S.Ct. 582 (1931); *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117, 46 S.Ct. 215 (1926); *Waite v. Macy*, 246 U.S. 606, 38 S.Ct. 395 (1918); *see Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 773, 67 S.Ct. 1493, 1503 (1947).

Thus, where challenged orders of an administrative agency "are on their face plainly invalid" because exclusive jurisdiction is invested in a federal regulatory agency, so that "No inquiry beyond the orders themselves and the undisputed facts which underlie them is necessary in order to discover that they are in conflict with the federal act," exhaustion is not required. *Public Utilities Comm'n v. United Fuel Gas Co.*, 317 U.S. 456, 469, 63 S.Ct. 369, 376 (1943). Indeed, the court held in the cited case that the mere fact that complainant company would incur expenses in complying with the void orders constituted sufficient irreparable injury to justify an injunction. The present case is strikingly similar, involving as it does a wholly unwarranted assertion of jurisdiction by officials whose orders now have not even the color of authority

which a subsisting statute might furnish.[30] And the showing of damage here goes far beyond the damage deemed sufficient in the *United Fuel* case.[31]

Of course the situation is different where the statute itself expressly creates the agency and spells out effective judicial review. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48, 58 S.Ct. 462 (1938):

> "The grant of that exclusive power is constitutional, because *the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board.* No power to enforce an order is conferred upon the Board. To secure enforcement the Board must apply to a Circuit Court of Appeals for its affirmance. And, until the Board's order has been affirmed by the appropriate Circuit Court of Appeals, no penalty accrues for disobeying it." (Emphasis added.)

---

[30]Despite the Appellants' same exhaustive argument, a number of district courts have granted preliminary injunctions in other suits attacking the statute and regulations involved here. *Forsyth Engineering Co. v. Fleming*, 24 CCH Lab.Cas. ¶ 67,829 (U.S.D.C., D.C., No. 3440-53, *per* Miller, J., 1953); *Aaron Machinery Co. v. National Enforcement Commission*, 24 CCH Lab.Cas. ¶ 67,869 (U.S.D.C., D.C., No. 3754-53, *per* Holtzhoff, J., 1953); *Belcher Oil Co. v. National Enforcement Commission*, 114 F.Supp. 377 (N.D. Ga. 1953).

[31]There is nothing in *Pennsylvania R. Co. v. Labor Board*, 261 U.S. 72, 43 S.Ct. 278 (1923) (Aplts. Br. p. 31), which indicates that equitable jurisdiction is lacking here. This case merely holds that a specific agency determination is in some circumstances not itself reviewable as long as the agency had jurisdiction to make the determination. The Court took pains to decide that the agency was granted constitutional statutory powers and was acting within them. The other cases cited are similar. We shall be satisfied if the Court decides this issue of jurisdiction.

BLEED THROUGH

BLURRED COPY

Contrast the present case, where the Act provides for neither procedure nor review, and where the order of the Economic Stabilization Administrator provides that agency action shall be final and conclusive upon the tax court and any other court (*supra,* pp. 80-81). The *Myers* case may be distinguished upon the additional ground that the principal issue before the Board and the court was whether operation of complainant's business affected interstate commerce—an issue peculiarly within the expert knowledge of the Board to determine initially. In the present case, on the other hand, the issues before the Court are issues upon which the agency had refused to rule and upon which it could not competently rule.

Appellants have attempted to meet the distinction between this case and cases involving agencies specifically created by statutes which prescribe an administrative remedy, by citing cases purportedly applying the exhaustion rule where the administrative remedy is prescribed by regulation issued pursuant to statutory authority. But in these cases the Court did *not* require exhaustion but proceeded to rule on the challenge to the administrative action involved.

Thus in *Fahey v. Mallonee,* 332 U.S. 245, 67 S.Ct. 1552 (1947), involving, as here, a direct appeal from a three-judge court, the Court decided the constitutional issues presented, held the hearing procedure prescribed by regulation valid, and did not even refer to the "exhaustion" rule. And similarly in *Goldsmith v. Board of Tax Appeals,* 270 U.S. 117, 46 S.Ct. 215 (1926), a suit for mandamus, the Court ruled upon the challenged powers of the tax court to issue rules regulating practice before it. In *Twentieth Century Airlines v. Ryan,*

..... U.S. ....., 74 S.Ct. 8, 11-12 (1953), Mr. Justice Reed pointed out that, "Applicants cite no case in this Court that enjoins the hearing of complaint before an administrative Board *with power* to enter an enforcement order that is *subject to judicial review*" (emphasis added).

C. The Specific Provisions in the Regulations Prohibiting Judicial Review of National Enforcement Commission Orders Are a Further Ground Justifying the Injunction Herein.

Appellants contend (Aplts. Br. pp. 38-41) that the provisions against judicial review contained in the orders of the Economic Stabilization Administrator (General Order 15 and General Procedural Regulation 1, Revised, *supra,* pp. 80-81), are not separate grounds entitling Appellee to an injunction. (The availability of judicial review of an administrative decision on the merits would not, of course, diminish Appellee's right to an injunction upon the grounds for equitable jurisdiction already discussed.)

Appellants state that the regulation barring review "either is lawful or it is not" (Aplts. Br. p. 40). Although Appellants have, throughout the course of this litigation contended that the regulations do not necessarily bar review, these regulations have remained unchanged and were recently adopted by the Director of the Office of Defense Mobilization. It is clear that the administrators want to be in a position to urge that their determinations be treated with absolute finality (this point is expanded *supra,* p. 81, n. 21); yet they argue that this posi-

BLEED THROUGH

BLURRED COPY

tion does not furnish Appellee with any reason to commence the present litigation. Nevertheless, where there is doubt concerning the existence of administrative remedy or remedy at law, an injunction will be granted. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 72 S.Ct. 863 (1952); *Hillsborough Tp. v. Cromwell,* 326 U.S. 620, 66 S.Ct. 445 (1946); *Wallace v. Hines,* 253 U.S. 66, 40 S.Ct. 435 (1920).

This is not the customary injunction case against an administrative agency. In cases where the doctrine of exhaustion of administrative remedies has been applied, the agency has been created and methods of review provided in specific statutory terms. Here the National Enforcement Commission has assumed adjudicatory powers without authority, has purported to make its determinations non-reviewable, and has continued to act in such manner after expiration of the statute giving any color of legality to its proceedings. In these circumstances the injunction issued below was in the nature of a writ of prohibition against assumption of power by administrative officials without statutory warrant.

We have just received (March 1, 1954), a copy of the unpublished February 19, 1954 opinion of Judge Holtzoff of the United States District Court for the District of Columbia in the case of *Slim Olson, Inc. v. National Enforcement Commission,* No. 4175-53. Therein he permanently enjoined the Commission from entering a final decision. The Court held that (1) any authority the

Commission may have theretofore had under the statute terminated on May 1, 1953, and (2) Section 405(f) did not authorize the President to disallow the total illegal wage, as distinguished from the illegal excess. In this latter connection, the Court observed that a serious Constitutional issue would be raised if the section were construed to authorize disallowance of the entire wage. Finally, in connection with the so-called "exhaustion" principle, Judge Holtzoff concluded:

> ". . . In this case the very existence of the agency has been challenged. In other words, the plaintiff urges in effect that the National Enforcement Commission has been abolished and its members have become private citizens who are intruding into the Government and usurping governmental powers that are not vested in them. Surely a person aggrieved by the action of a private citizen who is claimed to have no official status, but who arrogates official powers to himself, should not be required to submit himself to the assertion of authority before appealing to the courts. Whether the plaintiff's contention is well founded is a matter to be discussed hereafter, but if the plaintiff predicates his position on this basis, he should be permitted to resort to the courts and secure a decision in respect to the merits of his contention. At common law a writ of *quo warranto* would lie under such circumstances. Any remedy that could have been obtained by such a writ may now be secured by a civil action."

BLEED THROUGH

BLURRED COPY

Conclusion.

The three-judge statutory trial court properly enjoined the Appellants from proceeding against Appellee in an illegal, invalid, and unconstitutional administrative hearing. That decree should be affirmed by this Court.

Dated: March 2, 1954.

Respectfully submitted,

RICHARD W. LUND,
DANA LATHAM,
PAUL R. WATKINS,
Attorneys for Appellee.

RICHARD F. ALDEN,
GROVER R. HEYLER,
LATHAM & WATKINS,
Of Counsel.

BLEED THROUGH

BLURRED COPY

NO PAGE NUMBER

APPENDIX.

I.

Defense Production Act of 1950.

The Defense Production Act of September 8, 1950, 64 Stat. 798, 50 U.S.C. App. §§ 2061 *et seq.* (Supp. V 1952) (the section numbers of said 50 U.S.C. App. (Supp. V 1952) hereinafter appear in parenthesis following the section numbers of the Act), as amended by the Defense Production Act amendments of 1951, 65 Stat. 131; of 1952, 66 Stat. 296; and 1953, 67 Stat. 129, provides in pertinent part:

SECTION 401 (§2101) (Congressional policy).

* * * * * * * * *

SECTION 402 (§2102) (Authorization for price and wage controls).

* * * * * * * * *

SECTION 403(a) (§2103(a)) (Aplts. Br. Apdx. pp. 79-80).

* * * * * * * * *

SECTION 403(b) (§2103(b)).

(1) There is hereby created, in the present Economic Stabilization Agency, or any successor Agency, a Wage Stabilization Board (hereinafter in this subsection referred to as the 'Board'), which shall be composed, in equal numbers, of members representative of the general public, members representative of labor, and members representative of business and industry. The number of offices on the Board shall be established by Executive order.

(2) The members of the Board shall be appointed by the President, by and with the advice and consent of the Senate. The President shall designate a Chairman and Vice Chairman of the Board from among the members representative of the general public.

(3) * * *

(4) * * *

(5) The Board shall, under the supervision and direction of the Economic Stabilization Administrator—

(A) formulate, and recommend to such Administrator for promulgation, general policies and general regulations relating to the stabilization of wages, salaries, and other compensation; and

(B) upon the request of (i) any person substantially affected thereby, or (ii) any Federal department or agency whose functions, as provided by law, may be affected thereby or may have an effect thereon, advise as to the interpretation, or the application to particular circumstances, of policies and regulations promulgated by such Administrator which relate to the stabilization of wages, salaries, and other compensation.

For the purposes of this Act, stabilization of wages, salaries, and other compensation means prescribing maximum limits thereon. Except as provided in clause (B) of this paragraph, the Board shall have no jurisdiction with respect to any labor dispute or with respect to any issue involved therein. Labor disputes, and labor matters in dispute, which do not involve the interpretation or application of such regulations or policies shall be dealt with, if at all, insofar as the Federal Government is concerned, under the conciliation, mediation, emergency, or

BLEED THROUGH

BLURRED COPY

NO PAGE NUMBER

other provisions of laws heretofore or hereafter enacted by the Congress.

(6) Paragraph (5) of this subsection shall take effect thirty days after the date on which this subsection is enacted. The Wage Stabilization Board created by Executive Order Numbered 10161, and reconstituted by Executive Order Numbered 10233, as amended by Executive Order Numbered 10301, is hereby abolished, effective at the close of the twenty-ninth day following the date on which this subsection is enacted. After June 27, 1952, the present Wage Stabilization Board shall issue no regulation or order except with respect to individual cases pending before the Board prior to such date.

SECTION 404 (§2104).

In carrying out the provisions of this title, the President shall, so far as practicable, advise and consult with, and establish and utilize committees of, representatives of persons substantially affected by regulations or orders issued hereunder.

SECTION 405(a) (§2105(a)) (Aplts. Br. Apdx. p. 80).

* * * * * * * * *

SECTION 405(b) (§2105(b)) (Aplts. Br. Apdx. p. 81).

* * * * * * * * *

SECTION 407(a) (§2107(a)).

At any time within six months after the effective date of any regulation or order relating to price controls under this title or rent controls under the Housing and Rent Act of 1947, as amended, or, in the case of new grounds arising after the effective date of any such regulation or order, within six months after such new grounds arise,

any person subject to any provision of such regulation or order may, in accordance with regulations to be prescribed by the President, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.

* * * * * * * * *

SECTION 408 (§2108).

(a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals specifying his objections and praying that the regulation or orders protested be enjoined or set aside in whole or in part. * * *

(b) * * *

(c) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any such regulation or order issued under this title or under the Housing and Rent Act of 1947, as amended. Except as provided in this section, no court, Federal, State, or Territorial, shall have juris-

BLEED THROUGH

BLURRED COPY

NO PAGE NUMBER

diction or power to consider the validity of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title, or the Housing and Rent Act of 1947, as amended, authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

(d) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 409 or 706 of this Act, section 205 or 206 of the Housing and Rent Act of 1947, as amended, or section 371 of title 18, United States Code, involving alleged violation of any provision of any such regulation or order, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the President setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 407 of this title. Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation or order complained of or to dismiss the complaint. The court may authorize the introduction of evidence,

either to the President or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b) and (c) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

SECTION 409 (§2109).

(a) * * *

(b) * * *

(c) If any person selling any material or service violates a regulation or order prescribing a ceiling or ceilings, the person who buys such material or service for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50 as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation or order in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. * * *

(d) (Aplts. Br. Apdx. p. 82).

* * * * * * * * *

BLEED THROUGH

BLURRED COPY

NO PAGE NUMBER

SECTION 412 (§2112)

It is hereby declared to be the policy of the Congress that the President shall use the price, wage and other powers conferred by this Act, as amended, to promote the earliest practicable balance between production and the demand therefor of materials and services, and that the general control of wages and prices shall be terminated as rapidly as possible consistent with the policies and purposes set forth in this Act; and that pending such termination, in order to avoid burdensome and unnecessary reporting and record keeping which retard rather than assist in the achievement of the purposes of this Act, price or wage regulations and orders, or both, shall be suspended in the case of any material or service or type of employment where such factors as condition of supply, existence of below ceiling prices, historical volatility of prices, wage pressures and wage relationships, or relative importance in relation to business costs or living costs will permit, and to the extent that such action will be consistent with the avoidance of a cumulative and dangerous unstabilizing effect. It is further the policy of the Congress that when the President finds that the termination of the suspension and the restoration of ceilings on the sales or charges for such material or service, or the further stabilization of such wages, salaries, and other compensation, or both, is necessary in order to effectuate the purposes of this Act, he shall by regulation or order terminate the suspension.

SECTION 703(a) (§2153(a)) (Aplts. Br. Apdx. pp. 82-83).

* * * * * * * * *

SECTION 705(a) (§2155(a)) (Aplts. Br. Apdx. pp. 83-84).

* * * * * * * * *

SECTION 706(b) (§2156(b)) (Aplts. Br. Apdx. pp. 84-85).

* * * * * * * * *

SECTION 709 (§2159) (Aplts. Br. Apdx. pp. 85-86).

* * * * * * * * *

SECTION 717 (§2166).

(a) * * * (Aplts. Br. Apdx. p. 86).

(b)(3) * * * (Aplts. Br. Apdx. pp. 86-87).

(c) The termination of any section of this Act, or of any agency or corporation utilized under this Act, shall not affect the disbursement of funds under, or the carrying out of, any contract, guarantee, commitment or other obligation entered into pursuant to this Act prior to the date of such termination, or the taking of any action necessary to preserve or protect the interests of the United States in any amounts advanced or paid out in carrying on operations under this Act.

(d) * * *

BLEED THROUGH

BLURRED COPY

NO PAGE NUMBER

II.

Executive Orders and Regulations.

1. Executive Order No. 9809 of December 12, 1946, 11 Fed. Reg. 1428, provides in pertinent part:

By virtue of the authority vested in me by the Constitution and statutes, including Title I of the First War Powers Act, 1941, Title III of the Second War Powers Act, 1942, Section 201(b) of the Emergency Price Control Act of 1942, as amended, and section 2 of the Stabilization Act of 1942, and as President of the United States, it is hereby ordered, for the purpose of further effectuating the transition from war to peace and in the interest of the internal management of the Government, as follows:

* * * * * * * * *

10. (a) The National Wage Stabilization Board is terminated.

(b) The functions heretofore vested in the National Wage Stabilization Board pursuant to the provisions of section 5(a) of the Stabilization Act of 1942, as amended, are transferred to the Department of the Treasury.

* * * * * * * * *

2. Executive Order No. 10494, dated October 16, 1953, 18 Fed. Reg. 6585.

By virtue of the authority vested in me by the Constitution and laws of the United States, including the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 et seq.), hereinafter referred to as the Act, and as President of the United States and Commander in Chief of the armed forces of the United States, it is ordered

that the functions remaining under Title IV of the Act shall be, and they are hereby, delegated as follows:

Section 1. *Fiscal liquidation.* Such functions as remain in connection with the fiscal liquidation of the Economic Stabilization Agency are hereby transferred to the Secretary of the Treasury.

Sec. 2. *Administrative proceedings.* The function of conducting administrative proceedings under Title IV of the Act, including the conclusion of those instituted pursuant to section 405 and the taking of necessary actions under sections 407 and 408 of the Act, is hereby transferred to the Director of the Office of Defense Mobilization.

Sec. 3. *Enforcement and investigations.* In addition to the functions now vested in the Attorney General by the Act, he shall have, and they are hereby transferred to him, the following-prescribed functions under Title IV of the Act: (a) completing the processing of enforcement files, (b) concluding investigations where deemed appropriate, and (c) certifying disallowances (section 409(d)).

Sections 1 and 2 of this order shall become effective November 1, 1953. Section 3 shall become effective immediately.

Dwight D. Eisenhower, The White House, October 14, 1953.

3. Economic Stabilization Agency General Order No. 15, 17 Fed. Reg. 2994, 9977, Aplts. Br. Apdx. pp. 89-93.

* * * * * * * * *

BLEED THROUGH

BLURRED COPY

NO PAGE NUMBER

4. Economic Stabilization Agency General Procedural Regulation 1, of September 20, 1951, 16 Fed. Reg. 10018, as revised August 21, 1952, 17 Fed. Reg. 7737, Aplts. Br. Apdx. pp. 97-103, provides in pertinent part:

* * * * * * * * *

Section 10.1 *Interprctations.*—The Enforcement Commissioner, in making his findings and determinations, and the National Enforcement Commission in making its decisions, shall, to the extent applicable, be governed by the established regulations, interpretations, and policies formulated by the Board or Office involved in the enforcement proceeding.

* * * * * * * * *

5. Economic Stabilization Agency General Order No. 19 of December 15, 1952, 17 Fed. Reg. 11368, provides in pertinent part:

SECTION 1. *Purpose.* The purpose of this order is to provide for the continued administration of the wage stabilization program during the period that the Wage Stabilization Board is rendered inoperative by the resignation of the Industry Members of the Board. This order provides for an interim Wage Stabilization Committee and defines its functions.

SEC. 2. *Legal Basis and Authority.* This order is promulgated under the authority vested in the Economic Stabilization Administrator by the Defense Production Act of 1950, as amended (Pub. Law 774, 81st Congress, Pub. Laws 96 and 429, 82d Congress), Executive Order 10161, as amended, Executive Order 10182, and Executive Order 10205.

SEC. 3. *The Wage Stabilization Committee.* The present Public Members of the Wage Stabilization Board and any persons appointed as Public Members of the Board shall also serve and are hereby designated as members of the Wage Stabilization Committee. The Chairman of the Wage Stabilization Board is hereby designated as Chairman of the Wage Stabilization Committee.

SEC. 4(a). *Functions and Redelegation.* With the exception of promulgating general policies and regulations, the Wage Stabilization Committee is hereby authorized to perform, under the supervision and direction of the Economic Stabilization Administrator, and with respect to persons who are under the jurisdiction of the Wage Stabilization Board, created by Section 403(b) of the Defense Production Act, as amended, and Executive Order 10377 and Executive Order 10390, the wage stabilization functions authorized by Title IV of the Defense Production Act of 1950, as amended.

* * * * * * * * *

Section 5. * * *

Section 6. * * *

6. General Administrative Order-I-2, Revised, of the Office of Defense Mobilization and effective November 1, 1953, 18 Fed. Reg. 6966.

Administrative Proceedings Under Title IV of The Defense Production Act of 1950, as Amended.

Section 1. The purpose of this General Administrative Order is to provide for the conduct and orderly completion of administrative proceedings arising under section 405, 407 and 408 of the Defense Production Act

BLEED THROUGH

BLURRED COPY

NO PAGE NUMBER

of 1950, as amended, which function has been made the responsibility of the Director of the Office of Defense Mobilization by Executive Order 10494 of October 14, 1953 (18 F. R. 6585).

Sec. 2. Subject to such supervision as the Director may deem appropriate, the General Counsel of the Office of Defense Mobilization is hereby authorized to carry out the functions delegated to the Director by Executive Order 10494. For these purposes the General Counsel is also designated as Assistant Director of the Office of Defense Mobilization. The term "functions" includes powers, duties, authority, responsibilities, and discretion.

Sec. 3. The orders of the Economic Stabilization Agency which are relevant to the conduct and completion of administrative proceedings under sections 405, 407 and 408 of the act, particularly ESA General Order 15 and 18, as amended (17 F. R. 2994, 6925, and 9977); ESA General Procedural Regulation 1, Revised, as amended (17 F. R. 7737, 18 F. R. 1663); and OPS Price Procedural Regulation 1, Revision 2, as amended (17 F. R. 3787 and 9935) are hereby adopted and incorporated herein by reference.

Sec. 4. This General Administrative Order shall become effective November 1, 1953.

Office of Defense Mobilization.

Arthur S. Flemming, Director.

SUPREME COURT OF THE UNITED STATES

No. 450.—October Term, 1953.

Arthur P. Allen, Chairman, Twelfth Region Wage Stabilization Board, et al., Appellants, *v.* Grand Central Aircraft Co., a California Corporation.	On Appeal From the United States District Court for the Northern District of California.

[May 24, 1954.]

Mr. Justice Burton delivered the opinion of the Court.

The principal question for decision is whether the Defense Production Act of 1950 [1] authorized the President to apply administrative action to the enforcement of its wage stabilization provisions. For the reasons hereafter stated, we decide that it did.

There is here also the question whether such administrative enforcement may be applied even after the restrictions placed on wages under Title IV of the Act [2] have expired, provided the enforcement is limited to violations antedating such expiration. Our answer is in the affirmative.

Appellee further claims that the pending administrative proceeding should be enjoined because the mere conduct of that proceeding might cause it irreparable damage. For the reasons given below, we find that argument untenable.

---

[1] 64 Stat. 798, as amended, 65 Stat. 131, 66 Stat. 296, 67 Stat. 129, 50 U. S. C. App. (1946 ed., Supp. V) § 2061 *et seq.*

[2] "TITLE IV—PRICE AND WAGE STABILIZATION" containing §§ 401–412, 64 Stat. 803–812, 66 Stat. 304, and see 50 U. S. C. App. (1946 ed., Supp. V) §§ 2101–2110.

Appellee, Grand Central Aircraft Company, is a California corporation which was engaged, in 1951, in the production and repair of aircraft equipment in Glendale, California, and Tucson, Arizona. November 4, 1952, the Wage Stabilization Board [3] filed a complaint with the National Enforcement Commission [4] alleging in substance that appellee, between January 26, 1951, and January 1, 1952, had paid wage increases in violation of an order freezing wages at the levels of January 25, 1951.[5] Those payments consisted of wages totaling about $5,500,000, including about $750,000 alleged to have been in excess of the wage ceilings. January 14, 1953, the National Enforcement Commission appointed Phil C. Neal to hear the evidence as an Enforcement Commissioner and to recommend to the Commission a determination of the issues in the proceeding. He set the case for hearing on February 24 at Los Angeles, California, but further action was enjoined, as stated below, so that the proceeding is still pending at that stage.[6]

February 13, 1953, appellee filed the instant suit in the United States District Court for the Northern District of California, Southern Division. Appellee asked the court to restrain the defendant members of the Wage Stabilization Board, the National Enforcement Commis-

---

[3] Created, within the Economic Stabilization Agency, by § 403 (b) of the Defense Production Act, June 30, 1952, 66 Stat. 300–301. See also, Exec. Order No. 10377, 17 Fed. Reg. 6891; ESA Gen. Order No. 16, 17 Fed. Reg. 6925.

[4] ESA Gen. Order No. 18, effective July 30, 1952, 17 Fed. Reg. 6925, as amended at 9977, established NEC within the ESA and defined the functions of NEC.

[5] Gen. Wage Stabilization Regulation 1, issued by Economic Stabilization Administrator, January 26, 1951, 16 Fed. Reg. 816.

[6] The Government states that Neal, who is one of the appellants, is now on the staff of the Office of Defense Mobilization and is authorized and ready to conduct the hearing if the injunction is lifted.

BLEED THROUGH

BLURRED COPY

NO PAGE NUMBER

sion, officials of the Twelfth Region Wage Stabilization Board, and the Enforcement Commissioner, from proceeding with the administrative hearing. Only the regional officials and the Enforcement Commissioner were served. In its complaint, appellee denied that it had violated the Defense Production Act or any regulation or order under it. Appellee claimed also that the administrative procedure then being followed was unauthorized by the Constitution or any statute and that, even if originally authorized, that authorization had now expired. Finally, appellee claimed the hearing should be enjoined because the mere conduct of the proceeding would inflict irreparable damage upon it. A three-judge District Court, convened under 28 U. S. C. (1952 ed.) § 2282, granted the restraining order and interlocutory injunction sought by appellee against further conduct of the administrative proceeding. After hearing and trial, the injunction was made permanent. 114 F. Supp. 389. The order was then appealed to this Court under 28 U. S. C. (1952 ed.) § 1253. Stay of the injunction was denied, two Justices dissenting and one not participating. 345 U. S. 988. Probable jurisdiction of the appeal was noted. 346 U. S. 920.

A somewhat comparable case was decided by a three-judge United States District Court for the Northern District of Texas in favor of an employer June 14, 1953, in *Jonco Aircraft Corp.* v. *Franklin*, 114 F. Supp. 392, with Chief Circuit Judge Hutcheson dissenting. That judgment was reversed by this Court, *per curiam*, for failure of appellee to exhaust its administrative remedy. 346 U. S. 868.

I.

We consider first the claim to injunctive relief which appellee made on the ground that the conduct of the proposed administrative hearings would cause it irreparable damage by weakening its bank credit and depriving it of

essential working capital. On that basis, interlocutory relief was granted pending the court's determination of the ultimate issue of the validity of the administrative procedure. That injunction has been made permanent but the Government, on behalf of appellants, contends that appellee is acting prematurely in seeking such relief before carrying the prescribed administrative procedure at least to the point where it faces some immediate compulsion and greater probability of damage than it has established.

The proposed hearings are to be held before an Enforcement Commissioner with authority merely to recommend findings to a Regional Enforcement Commission subject to review by the National Enforcement Commission. Those findings may show no violation of wage ceilings. At most, they will be concerned with appellee's alleged payment of wages in excess of wage ceilings to an extent of about $750,000. If such a violation of the ceilings is found by the National Enforcement Commission, it may then, under § 405 (b) of the Defense Production Act of 1950 and the President's delegated authority, certify to governmental agencies, including the Bureau of Internal Revenue for income-tax purposes, the disallowance of all or part of appellee's illegal wage payments. Appellee argues that such proceedings carry the possibility of the disallowance as a business expense, for income-tax purposes, of $750,000, more or less, up to the total wages paid, exceeding $5,500,000. Appellee contends also that the mere threat of such action would jeopardize the bank credit upon which it depends for essential working capital. There is grave doubt of the right of appellee thus to test the validity of administrative procedure before exhausting it or bringing the issues closer to a focus than it has done. However, it is clear that once the right of the Government to hold administrative hearings is established, a litigant cannot enjoin

BLEED THROUGH

BLURRED COPY

NO PAGE NUMBER

them merely because they might jeopardize his bank credit or otherwise be inconvenient or embarrassing. *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752, 777–779. "[T]he expense and annoyance of litigation is 'part of the social burden of living under government.'" *Petroleum Exploration, Inc.* v. *Public Service Commission,* 304 U. S. 209, 222. See also, *Myers* v. *Bethlehem Corp.,* 303 U. S. 41, 47; *Chicago & Southern Air Lines* v. *Waterman Corp.,* 333 U. S. 103, 112–113; *Franklin* v. *Jonco Aircraft Corp., per curiam,* 346 U. S. 868.

It is appellee's principal claim that there is no properly authorized administrative procedure for it to exhaust and that the administrative authorities who seek to determine its case have no lawful right to do so. We, therefore, go directly to the heart of this controversy, which is the question whether the administrative enforcement of the 1950 wage stabilization program has been validly authorized.

II.

The procedure in question is prescribed by General Procedural Regulation 1, Revised, issued by the Economic Stabilization Administrator, August 21, 1952, 17 Fed. Reg. 7737. The hearings are to be conducted regionally by an Enforcement Commissioner and provision is made for appeal to the National Enforcement Commission. That Commission (NEC) is authorized to issue a certificate of disallowance prescribing the amount of wages to be disregarded by the executive departments and other governmental agencies in determining the costs and expenses of appellee for the purposes of any other law or regulation. ESA Gen. Order No. 18, July 28, 1952, 17 Fed. Reg. 6925. Standards of action are prescribed by the Economic Stabilization Administrator in his General Order No. 15, April 3, 1952, 17 Fed. Reg. 2994. Appellee does not complain of noncompliance with these regula-

tions. It complains rather that they are not authorized by statute or that, if purporting to be so authorized, the statute violates the Federal Constitution.

The Government finds authority for the creation of this administrative machinery in § 405 (b) of the Defense Production Act of 1950, when read in connection with the entire Act. That section is derived from § 5 (a) of the Stabilization Act of 1942, 56 Stat. 767, 50 U. S. C. App. (1946 ed.) § 965 (a). To read the Defense Production Act of 1950 without reference to this model is to read it out of the context in which Congress enacted it.

The Stabilization Act of 1942 was a vital wartime measure, adopted October 2, 1942, directing the President "on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living."[7] In it, Congress relied upon presidential action geared to the critical necessity for speedy compliance. Its purpose was to check inflation. It subordinated individual convenience to nation-wide standards. Its sanctions were entrusted to administrative agencies capable of prompt action. Section 5 (a) provided that—

> "No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act. The President shall also prescribe the extent

---

[7] 56 Stat. 765, 50 U. S. C. App. (1946 ed.) § 961 *et seq.* The Stabilization Act itself was an amendment to the Emergency Price Control Act of 1942, approved January 30, 1942, 56 Stat. 23, 50 U. S. C. App (1946 ed.) § 901 *et seq.* For its title, see 58 Stat. 643. It was temporary legislation. Its termination date was June 30, 1944, or "such earlier date as the Congress by concurrent resolution, or the President by proclamation, may prescribe." 56 Stat. 767. That date was postponed, one year at a time, to June 30, 1947. 58 Stat. 643, 59 Stat. 306, 60 Stat. 664, 50 U. S. C. App. (1946 ed.) § 966.

BLEED THROUGH

BLURRED COPY

NO PAGE NUMBER

to which any wage or salary payment made in contravention of such regulations shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation." 56 Stat. 767, 50 U. S. C. App. (1946 ed.) § 965 (a).

The Act granted the President broad powers to promulgate regulations.[8] October 3, 1942, he issued Executive Order No. 9250, 7 Fed. Reg. 7871, "to control so far as possible the inflationary tendencies and the vast dislocations attendant thereon which threaten our military effort and our domestic economic structure, and for the more effective prosecution of the war." That order established an Office of Economic Stabilization, headed by an Economic Stabilization Director. In Title II it established a national "Wage and Salary Stabilization Policy." This placed wage rates under the control of the National War Labor Board and froze them generally at the levels prevailing September 15, 1942. In Title III it authorized the National War Labor Board to issue rules and regulations "for the speedy determination of the propriety of any wage increases or decreases in accordance with this Order." It thus established administrative processes for making specific determinations of wages paid in contravention of the Act. The same processes also enabled the Government, through other agencies, to disregard such illegal payments when computing taxes, compensation under cost-plus contracts and other governmental transactions.

---

[8] "SEC. 2. The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. . . ." 56 Stat. 765, 50 U. S. C. App. (1946 ed.) § 962.

October 27, 1942, James F. Byrnes, the Economic Stabilization Director, with the personal approval of the President, issued the regulations which later were to serve as the model for the regulations now before us.[9] They delegated to the National War Labor Board authority to certify, to all executive departments and other agencies of the Government, disallowances of payments of wages based upon the Board's determination of their violation of the Act.[10]

July 30, 1943, the Board adopted rules to govern its procedures and those of Regional War Labor Boards in dealing with violation of the wage stabilization program. Those regulations likewise are comparable to the ones involved in this case. 9 Fed. Reg. 4681 *et seq.*

---

[9] Office of Economic Stabilization—Pt. 4001—Wages and Salaries, 7 Fed. Reg. 8748 *et seq.* Subsequent amendments did not change the provisions for making tax disallowances based upon specific administrative determinations.

[10] "§ 4001.2 *Authority of National War Labor Board.* The Board shall . . . have authority to determine whether any

"(a) Wage payments . . .

. . . . . .

"are made in contravention of the Act, or any rulings, orders or regulations promulgated thereunder. Any such determination by the Board, made under rulings and orders issued by it, that a payment is in contravention of the Act, or any rulings, orders, or regulations promulgated thereunder, shall be conclusive upon all Executive Departments and agencies of the Government in determining the costs or expenses of any employer for the purpose of any law or regulation, either heretofore or hereafter enacted or promulgated, including the Emergency Price Control Act of 1942 or any maximum price regulation thereof, or for the purpose of calculating deductions under the revenue laws of the United States, or for the purpose of determining costs or expenses under any contract made by or on behalf of the United States. Any determination of the Board made pursuant to the authority conferred on it shall be final and shall not be subject to review by The Tax Court of the United States or by any court in any civil proceedings." 7 Fed. Reg. 8749.

BLEED THROUGH

BLURRED COPY

NO PAGE NUMBER

Nearly 100,000 proceedings were thus held and disallowances of nearly $30,000,000 were made up to February 24, 1947.[11] Those proceedings were matters of general public knowledge and were well known to Congress.[12] They support the natural presumption that Congress, in its subsequent actions, accepted them as legitimate interpretations of the Stabilization Act. *Shapiro* v. *United States*, 335 U. S. 1, 16; *Helvering* v. *Winmill*, 305 U. S. 79, 82–83; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 310–315; *Hecht* v. *Malley*, 265 U. S. 144, 153.

Under the Act of 1942, the President thus determined, through his administrative agencies, many specific violations of the prescribed wage ceilings. It was the practice of those administrative agencies to certify to other departments and agencies specific disallowances

---

[11] From October 3, 1942, to December 29, 1945, 68,233 cases, resulting in disallowances of $19,018,820.19, were handled by the National War Labor Board. 1 Termination Report, National War Labor Board, 428–441. From January 1, 1946, to January 30, 1947, 30,071 cases, resulting in disallowances of $11,822,609, were handled by the National Wage Stabilization Board. National Wage Stabilization Board (1946–1947) 223–235. While many cases resulted in findings of no violation or were closed without penalty or disallowance, many others were terminated with disallowances, either by consent or after hearings. There were 282 appeal cases processed by the National Boards, and although the controls were terminated in November 1946 by Executive Order No. 9801, 11 Fed. Reg. 13435, the enforcement activities, based on earlier violations, were carried on by the Department of the Treasury until 1949. See Ann. Reps. of the Commissioner of Internal Revenue 62-63 (1947); 33-34 (1948); 26-27 (1949).

[12] Not only was the life of the Act extended three times (see note 7, *supra*) but its administration was reviewed during annual appropriation hearings. See Hearings before the House Subcommittee on Appropriations on National War Agencies Appropriation Bills for 1944, Pt. 2, 78th Cong., 1st Sess. 667–668; for 1945, Pt. 1, 78th Cong., 2d Sess. 240–241, 303–304; for 1946, 79th Cong., 1st Sess. 12–13.

of the wages paid in violation of such ceilings. See *Troy Laundry Co.* v. *Wirtz*, 155 F. 2d 53; *Woodworth Co.* v. *Kavanagh*, 102 F. Supp. 9, aff'd, 202 F. 2d 154.

A comparison of the terms of the Act of 1942 with those of the Defense Production Act of September 8, 1950, and a comparison of the regulations and practice under those Acts is impressive.

Section 405 (b) of the later Act is as follows:

> "No employer shall pay, and no employee shall receive, any wage, salary, or other compensation in contravention of any regulation or order promulgated by the President under this title. The President shall also prescribe the extent to which any wage, salary, or compensation payment made in contravention of any such regulation or order shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation." 64 Stat. 807, 50 U. S. C. App. (1946 ed., Supp. V) § 2105 (b).

It follows, almost word for word, the language of § 5 (a) of the earlier Act, *supra*, at pp. 6–7. While it substitutes the phrase "any wage, salary, or other compensation" in place of "wages or salaries," and the phrase "any regulation or order" in place of "the regulations," the substance of the two sections is inescapably the same.

The Act of 1950 granted the President broad powers to make regulations under it and to delegate the authority conferred upon him by it.[13] His orders and regulations

[13] "SEC. 403. (a) At such time as the President determines that it is necessary to impose price and wage controls generally over a substantial portion of the national economy, he shall administer such controls . . . through a new independent agency created for such purpose: . . . . Such agency may utilize the services, information, and facilities of other agencies and departments of the Government, but such agency shall not delegate enforcement of any of the controls

BLEED THROUGH

BLURRED COPY

NO PAGE NUMBER

follow the pattern of the earlier ones. September 9, 1950, he issued Executive Order No. 10161, 15 Fed. Reg. 6105, 6106, Part IV of which created a new agency known as the Economic Stabilization Agency, headed by an Economic Stabilization Administrator. To him the President delegated responsibility for wage stabilization. He established, within such agency, a Wage Stabilization Board with functions to be determined by the Administrator. January 24, 1951, Eric Johnston, then the Administrator, delegated to that Board his functions of wage stabilization. ESA Gen. Order No. 3, 16 Fed. Reg. 739. January 26, he froze wages generally at the levels prevailing January 25. Gen. Wage Stabilization Regulation No. 1, 16 Fed. Reg. 816.

---

to be administered by it under this section to any other agency or department." 64 Stat. 807, as amended, 65 Stat. 137, 66 Stat. 300. See 50 U. S. C. App. (1946 ed., Supp. V) § 2103. (Delegations as to the enforcement of controls, accordingly, were made only to officials within the new independent agency known as the Economic Stabilization Agency.)

"SEC. 703. (a) Except as otherwise specifically provided, the President may delegate any power or authority conferred upon him by this Act to any officer or agency of the Government, including any new agency or agencies (and the President is hereby authorized to create such new agencies, other than corporate agencies, as he deems necessary), and he may authorize such redelegations by that officer or agency as the President may deem appropriate. . . ." 64 Stat. 816, 50 U. S. C. App. (1946 ed., Supp. V) § 2153 (a).

"SEC. 704. The President may make such rules, regulations, and orders as he deems necessary or appropriate to carry out the provisions of this Act. Any regulation or order under this Act may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions as in the judgment of the President are necessary or proper to effectuate the purposes of this Act, or to prevent circumvention or evasion, or to facilitate enforcement of this Act, or any rule, regulation, or order issued under this Act." 64 Stat. 816, see 50 U. S. C. App. (1946 ed., Supp. V) § 2154.

Enforcement under the Act of 1950 thus closely resembled enforcement under the Act of 1942. June 13, the Wage Stabilization Board established a National Enforcement Commission and authorized the establishment of Regional Enforcement Commissions. Such Commissions were authorized to make determinations of wage violations and the disallowances of specific wage payments under § 405 (b). Those determinations were to be "conclusive for the purpose therein stated. The executive departments and other agencies of the government which receive certifications of such determinations shall disregard and disallow the amount thus certified." WSB Enforcement Resolution No. 1, § 1 (c), 16 Fed. Reg. 6028, 6029. June 28, this procedure was further described in a resolution of the War Stabilization Board. 16 Fed. Reg. 7284.

April 3, 1952, the Economic Stabilization Administrator, in General Order No. 15, 17 Fed. Reg. 2994, prescribed the standards to be followed in making disallowances, including a recognition of extenuating and mitigating circumstances.

Effective July 30, 1952, § 403 (b) of the Act was amended to establish a new Wage Stabilization Board. 66 Stat. 300-301. Its functions were defined by the Economic Stabilization Administrator in ESA General Order No. 16, 17 Fed. Reg. 6925. On the same day, he issued ESA General Order No. 18, 17 Fed. Reg. 6925, defining the functions of the National Enforcement Commission. The order covered the Commission's authority to determine and certify specific disallowances in accordance with the standards prescribed in General Order No. 15, *supra*. The language and substance is obviously reminiscent of that under the Act of 1942.[14]

[14] "SEC. 4. *Functions of the National Enforcement Commission.* (a) The functions of the National Enforcement Commission (hereinafter referred to as the Commission) shall be, with respect to persons

BLEED THROUGH

BLURRED COPY

NO PAGE NUMBER

The legislative history confirms the parallel nature of the two programs. The occasion for the Act of 1950 was the recurring need to check inflation. The military demands in Korea and elsewhere in 1950 made it necessary to maintain a large production of military goods while seeking also to meet the long-denied and increasing needs of the Nation's civil economy. The 1950 Act expressly declared its purpose.[15] Congress reenacted, on a

---

within the jurisdiction of the Wage Stabilization Board, the Salary Stabilization Board and the Office of Salary Stabilization, and the Railroad and Airline Wage Board, to determine whether any wage, salary, or other compensation has been paid or accrued, at any time, in violation or contravention of any provision of the Defense Production Act of 1950, as amended, or any regulation or order or directive heretofore or hereafter promulgated under the act. Such determination shall be made by the Commission after any of the foregoing named constituent organizations of this Agency have instituted an enforcement proceeding before it or after any such organization has submitted a settlement proposal to the Commission for its approval. Such determination shall be final within the Economic Stabilization Agency.

"(b) The Commission is further authorized to certify and transmit such determinations in accordance with the policy and procedure set forth in Economic Stabilization Agency General Order No. 15, and other orders, directives, general policies or general regulations of the Economic Stabilization Administrator.

"SEC. 5. *Redelegation of authority.* (a) The authority delegated to the Economic Stabilization Administrator with respect to the imposition of disallowance sanctions under section 405 (b) of the Defense Production Act, as amended, for the violation or contravention of any provisions of, or any orders or any regulations issued under said act, as amended, relating to the payment of wages, salaries, or other compensation, is hereby redelegated to the Commission, in accordance with the functions described above." 17 Fed. Reg., at 6926.

[15] "SEC. 2. . . . The United States is determined to develop and maintain whatever military and economic strength is found to be necessary to carry out this purpose. Under present circumstances, this task requires diversion of certain materials and facilities from civilian use to military and related purposes. It requires expansion of productive facilities beyond the levels needed to meet the civilian

temporary basis, the emergency powers of the President which had been effective during World War II.[16]

The Senate Report on the 1950 bill expressly said:

> "This subsection [405 (b)] adopts the language of the Stabilization Act of October 2, 1942, respecting the penalties to be applied for violations of the wage and salary stabilization program. The committee finds that the disallowance of illegal wage payments as a cost of doing business, for purposes of computing taxes, Government contract payments, and for purposes of establishing price ceilings, was an effective deterrent." S. Rep. No. 2250, 81st Cong., 2d Sess. 39.

The regulations, procedures and practices comparable to those under the Act of 1942 were fully reported to Congress.[17]

---

demand. In order that this diversion and expansion may proceed at once, and that the national economy may be maintained with the maximum effectiveness and the least hardship, normal civilian production and purchases must be curtailed and redirected.

"It is the objective of this Act to provide the President with authority to accomplish these adjustments in the operation of the economy. It is the intention of the Congress that the President shall use the powers conferred by this Act to promote the national defense, by meeting, promptly and effectively, the requirements of military programs in support of our national security and foreign policy objectives, and by preventing undue strains and dislocations upon wages, prices, and production or distribution of materials for civilian use, within the framework, as far as practicable, of the American system of competitive enterprise." 64 Stat. 798, 799, 50 U. S. C. App. (1946 ed., Supp. V) § 2062.

See S. Rep. No. 2250, 81st Cong., 2d Sess. 4–5, 20–40.

[16] The 1950 Act, generally, was to terminate June 30, 1952. Title IV, as to price and wage stabilization, was to expire June 30, 1951. 64 Stat. 822. The latter date was extended to April 30, 1953. 66 Stat. 306, 67 Stat. 131. The survival of enforcement procedure in relation to prior violations is discussed in Section III of this opinion.

[17] First Ann. Rep. of the Joint Committee on Defense Production, S. Rep. No. 1040, 82d Cong., 1st Sess. 98–103 (1951); Second Ann. Rep. of the same Committee, S. Rep. No. 3, 83d Cong., 1st Sess. 108–119 (1952).

BLEED THROUGH

BLURRED COPY

NO PAGE NUMBER

Despite this history of administrative enforcement under the 1942 Act, appellee claims that, under the 1950 Act, the President had no authority to apply administrative action to the enforcement of wage stabilization. Appellee argues that § 706 of the later Act,[18] as set forth

---

[18] "SEC. 706. (a) Whenever in the judgment of the President any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the President that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.

"(b) The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this Act or any rule, regulation, order, or subpena thereunder, and of all civil actions under this Act to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, order, or subpena thereunder. Any criminal proceeding on account of any such violation may be brought in any district in which any act, failure to act, or transaction constituting the violation occurred. Any such civil action may be brought in any such district or in the district in which the defendant resides or transacts business. Process in such cases, criminal or civil, may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found; the subpena for witnesses who are required to attend a court in any district in such case may run into any other district. The termination of the authority granted in any title or section of this Act, or of any rule, regulation, or order issued thereunder, shall not operate to defeat any suit, action, or prosecution, whether theretofore or thereafter commenced, with respect to any right, liability, or offense incurred or committed prior to the termination date of such title or of such rule, regulation, or order. No costs shall be assessed against the United States in any proceeding under this Act. All litigation arising under this Act or the regulations promulgated thereunder shall be under the supervision and control of the Attorney General." 64 Stat. 817–818, as amended, 65 Stat. 139, 50 U. S. C. App. (1946 ed., Supp. V) § 2156.

in the margin, vested enforcement of the Act in the District Courts and thus left to the President only authority to promulgate general regulations. We do not agree. Section 706 appears in Title VII containing the so-called "general provisions" of the Act. Appellee reads the section as sharply restricting the administrative procedure which we have just described. Such an interpretation, however, cannot be given to it in the face of § 405 (b). Instead of sharply restricting the revival of administrative enforcement of wage ceilings under § 405 (b), we read § 706 as primarily applicable to other activities under the Act. It applies naturally enough to price controls, credit controls and allocations of material. We hold that the specific language of § 405 (b) should receive the same construction now that was placed on similar language in the Act of 1942. The "general provisions" of § 706 do not restrict the specific provisions of § 405 (b) now reenacted.[19]

The correctness of the above interpretation was underscored July 31, 1951, when Congress inserted a new § 405 (a).[20] In language strikingly similar to § 405 (b),

---

[19] That this is a logical interpretation of § 706 is emphasized by the fact that the bills which became the Act of 1950 contained, when introduced, provisions for credit and commodity controls but no provisions for wage stabilization. Thus the section that was to become § 706 originally had no reference to wage stabilization. Title IV, including § 405 (b) as to wage stabilization, was inserted in Committee. The separate origins of §§ 405 (b) and 706 point to the separate effect which should be given to them. See S. Rep. No. 2250, 81st Cong., 2d Sess. 5.

[20] ". . . The President shall also prescribe the extent to which any payment made, either in money or property, by any person in violation of any such regulation, order, or requirement [as to price control] shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any

BLEED THROUGH

BLURRED COPY

NO PAGE NUMBER

that new section introduced administrative enforcement for price controls. Obviously it was not to be substantially eliminated by the existing provisions of § 706. As the specific language of § 405 (a) is thus controlling over the general provisions of § 706, so the same specific language in § 405 (b) is controlling over those same provisions.[21]

We have noted the other arguments submitted by appellee concerning the interpretation and constitutionality of the statute but it would be premature action on our part to rule upon these until after the required administrative procedures have been exhausted.[22]

---

such person for the purposes of any other law or regulation, including bases in determining gain for tax purposes." 65 Stat. 136, 50 U. S. C. App. (1946 ed., Supp. V) § 2105 (a).

[21] This interpretation of § 405 (a) and (b) is consistent, likewise, with the interpretation given to § 5 of the Stabilization Act of 1942. The Stabilization Act of 1942 was superimposed on the Emergency Price Control Act of 1942, 56 Stat. 23, which already contained general provisions for judicial enforcement. The solution reached was to apply those general provisions (§ 205 (a)(b) and (c)) without restricting the administrative procedure prescribed in § 5 for wage control. 56 Stat. 33, 50 U. S. C. App. (1946 ed.) § 925 (a)(b)(c).

Finally, the text of § 403 uses the word "enforcement" in referring to the powers of the administrative agencies in connection with wage controls. In referring to the new agency to be created, it provides that "such agency shall not delegate *enforcement* of any of the controls to be administered by it under this section to any other agency or department." (Emphasis supplied.) 64 Stat. 807, 50 U. S. C. App. (1946 ed., Supp. V) § 2103.

See also, the Conference Report on the Defense Production Act Amendments of 1952 which said: "The conference substitute is not intended to preclude the [Wage Stabilization] Board from, *as at present, enforcing* wage stabilization regulations and policies." (Emphasis supplied.) H. R. Rep. No. 2352, 82d Cong., 2d Sess. 24.

[22] The constitutional objections suggested are that the Act and proceedings which have been taken and are proposed under it violate

III.

Finally, appellee contends that, by the termination of the substantive provisions of the Defense Production Act of 1950, all authority has now expired for determining or disallowing past, as well as future, payments made in violation of wage ceilings.

As the Act is a temporary statute, the effect of its expiration is governed by the following general savings statute:

> "The expiration of a *temporary statute* shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, *unless* the temporary statute shall so *expressly* provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." (Emphasis supplied.) 1 U. S. C. (1952 ed.) § 109.

We find no express, or even implied, provision in the Act contrary to the policy of the general savings statute. All of the alleged violations here involved occurred in 1951. The substantive provisions of Title IV relating to wage stabilization and the supporting orders fixing the wage ceilings here at issue did not expire until April 30, 1953. Neither that expiration date nor the six-month

---

(1) the Fifth Amendment by depriving appellee of property without due process of law; (2) the Sixth or Seventh Amendment by depriving appellee of the right to a jury trial; (3) the Eighth Amendment in authorizing excessive fines; (4) Article I, § 9, by authorizing an unapportioned direct tax; (5) Article I, § 1, by improper delegation of legislative power to the Executive; and (6) the Tenth Amendment by attempting to legislate on matters reserved to the States.

BLEED THROUGH

BLURRED COPY

NO PAGE NUMBER

extension of it for liquidation purposes restricts the general provision of § 109 as to the survival of enforcement proceedings.[23]

The precise object of the general savings statute is to prevent the expiration of a temporary statute from cutting off appropriate measures to enforce the expired statute in relation to violations of it, or of regulations issued under it, occurring before its expiration. *United States* v. *Allied Oil Corp.*, 341 U. S. 1, 5; *Fleming* v. *Mohawk Co.*, 331 U. S. 111.

A similar situation followed the expiration, in 1946, of the substantive provisions of the Stabilization Act of

---

[23] "SEC. 717. (a) Title I [priorities and allocations] . . . title III [expansion of productive capacity and supply], and title VII [general provisions] . . . of this Act, and all authority conferred thereunder, shall terminate at the close of June 30, 1955. . . . Titles IV [price and wage stabilization] and V [settlement of labor disputes] of this Act, and all authority conferred thereunder, shall terminate at the close of April 30, 1953.

"(b) Notwithstanding the foregoing—

. . . . . .

"(3) Any agency created under this Act may be continued in existence for purposes of liquidation for not to exceed six months after the termination of the provision authorizing the creation of such agency." 64 Stat. 822, as amended, 65 Stat. 144, 66 Stat. 306, 67 Stat. 131.

Executive Order No. 10434, February 6, 1953, 18 Fed. Reg. 809, suspended the wage stabilization program but provided that "This order shall not operate to defeat any suit, action, prosecution, or administrative enforcement proceeding, whether heretofore or hereafter commenced, with respect to any right, liability, or offense possessed, incurred, or committed, prior to this date."

See also, Hearings before the House Subcommittees on Appropriations, Pt. 1, 83d Cong., 1st Sess. 439–441, on The Supplemental Appropriation Bill, 1954, introduced in the House as H. R. 6200, and those on the same bill before the Senate Committee on Appropriations, 83d Cong., 1st Sess. 423–431.

1942,[24] and we have seen that the enforcement proceedings continued under it until 1949. See note 11, *supra*. On that occasion the authority to make disallowances was transferred to the Department of the Treasury. Exec. Order No. 9809, ¶10 (b), 11 Fed. Reg. 14281, 14283. In the present instance, wage stabilization enforcement has been transferred to the Director of the Office of Defense Mobilization. Exec. Order No. 10494, October 14, 1953, 18 Fed. Reg. 6585. The authority of the President to make such a delegation of his powers appears in §§ 703 and 705, and such authority remains effective until June 30, 1955, § 717 (a), note 23, *supra*.

The validity of the pending administrative proceeding being thus upheld, the judgment of the District Court enjoining that proceeding is

Reversed.

---

[24] ". . . Though most of the controls have been lifted, the Act is still in effect. Liabilities incurred prior to the lifting of controls are not thereby washed out. *United States* v. *Hark*, 320 U. S. 531, 536; *Utah Junk Co.* v. *Porter*, 328 U. S. 39, 44; *Collins* v. *Porter*, 328 U. S. 46, 49. And Congress has explicitly provided that accrued rights and liabilities under the Emergency Price Control Act are preserved whether or not suit is started prior to the termination date of the Act. If investigation were foreclosed at this stage, such rights as may exist would be defeated, contrary to the policy of the Act." *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 119.

BLEED THROUGH

BLURRED COPY

NO PAGE NUMBER